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**THE RESPONSIBILITY TO PROTECT AND
THE NOTION OF IRRESPONSIBILITY
IN INTERNATIONAL LAW**

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Thesis submitted in partial fulfilment of the
requirements for the degree of
PhD in Law Studies

University of Sussex
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Declaration

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another university for the award of any other degree and the work produced here is my own except where stated otherwise.

Signature

Date

Acknowledgements

It is difficult to give thanks to all the friends whose words and gestures of sheer love and kindness kept me going. However, some people deserve to be mentioned because without them finishing up this thesis would be impossible.

I left the UK in late 2012 and it was not until late 2014 that I picked up the project again. This thesis was largely completed in my home country, Cyprus. So if there is one person that has made this thesis possible, it is my supervisor Dr. Tarik Kochi. I feel extremely lucky to have met and had him as my supervisor, not only for his intellectual rigour and inspiration, but also as a person. He was committed and cared for my thesis, was understanding, responded to all my queries and given feedback promptly and was sensitive to the real living conditions that sometimes impeded studying. For me, he represents supervision at the very best; words are not enough to express how thankful I am.

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Summary

The responsibility to protect concept (R2P), as specified in the report of the International Commission of Intervention and State Sovereignty (ICISS) in 2001, is a re-articulation of the overworked right of humanitarian intervention. Since then, the concept has been used by the international community, as a form of moral argumentation that justifies the use of force for human protection purposes. One of the connecting threads of this thesis has been to reflect on the meaning, effects and limits of ‘responsibility’ within R2P. This thesis explores the concept’s institutionalization, its juridico-moral framework and structure of address. The resulting insight points to a ‘notion of irresponsibility’ that is internal to responsibility practices, as these originate from modern forms of social organization and their ‘mentalities’. This thesis attempts to argue that the global ethical responsibility we find within R2P emanates from a foreclosing structure of address. Such a foreclosing structure fails the promise of protection at an inter-subjective/intra-subjective level and transforms global ethical responsibility into a project of governance, management and control. This vantage point is one in which the ‘international community’ of liberal international law and legal cosmopolitanism projects a self-assured self and fails to account for the limits of its own self-understanding, irresponsibility and violence. The juridico-moral framework of R2P both constitutes and is constitutive of forms of political subjectivity. Therefore, it materially circumscribes the politico-ethical limits of the structure of address of social and political violence globally. Drawing on Jacques Derrida and Judith Butler, the ‘notion of irresponsibility’ expounded in this thesis exposes the internal conditions, paradoxes and ‘aporias’ of responsibility and therefore, it also embodies them. It works as a conceptual resource, a kind of ‘talking-back’ to its discourse and presents a re-appropriation or representation of the global scene of address of social and political violence. This vantage point yields a radically different approach from that taken by liberal internationalists and legal cosmopolitans. This research contributes a critique of the juridico-moral framework of the concept and of our resourcefulness for global ethical judgment.

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Acronyms

CIA	Central Intelligence Agency of the United States of America
GA	General Assembly of the United Nations
GNA	Government of National Accord (Libya)
FRY	Federal Republic of Former Yugoslavia
HoR	House of Representatives (Libya)
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICL	International Criminal Law
ILC	International Law Commission
IDPs	Internally Displaced Persons
IL	International Law
IR	International Relations
ISIL, IS or ISIS	Islamic State of the Iraq and the Levant
KLA	Kosovo Liberation Army
LNA	Libyan National Army
MSF	Médecins Sans Frontières
NATO	North Atlantic Treaty Organization
NTC	National Transitional Council of Libya
OSCE	Organization for Security and Co-operation in Europe
P-5	Permanent Five Members of the Security Council
PKK	Kurdistan Workers' Party
R2P	Responsibility to Protect
SG	Secretary General of the United Nations
SDO	World Summit Document Outcome 2005
UK	United Kingdom
UN	United Nations
UNAMID	United Nations Mission in Darfur
UNDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNMISS	United Nations Mission in South Sudan
UNOSOM	United Nations Operation in Somalia
UNPO	United Nations Peacekeeping Operations
UNITAF	Unified Task Force
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolutions
UNSMIL	United Nations Support Mission in Libya
US	United States of America
UAVs	Unmanned Aerial Vehicles
WMDs	Weapons of Mass Destruction
WWI	World War One
WWII	World War Two
YPG	People's Protection Units (Syria)

INTRODUCTION

In 2001, the International Commission of Intervention and State Sovereignty (ICISS) published a report under the name “The Responsibility to Protect” (R2P) to address the so-called ‘right of humanitarian intervention’ and the many calls of intervention of the 1990s – Somalia, Rwanda, Bosnia and Kosovo.¹ This thesis attempts to investigate the moral, political and legal claims of the responsibility to protect concept in international law. R2P has become the prominent medium of inquiry and structure of address of the ‘international community’ in response to mass human atrocities and gross human rights violations. Through an analysis of the relationship between just war theory and R2P, I am able to explain why just war reasoning is being reinvented within R2P and to show how the language of protection can overshadow international practices of expanding punitiveness in the name of human rights. The thesis argues that the responsibility to protect concept materializes not only as a practice of protection but also as a form of punishment.

The mainstream discourse around R2P typically ignores the broader meaning and effects of military intervention for human protection purposes. In this sense, what is at stake is how the concept materially controls the discursive framework of moral justifications on the use of force for human protection purposes. The present thesis exposes the conditions, paradoxes and ‘aporias’ of responsibility within the R2P and points to a ‘notion of irresponsibility’ that is internal to responsibility practices, as these originate from modern forms of social organization and their mentalities. Drawing on critical legal literature, critical international relations literature and the accounts of social and political responsibility we find in Jacques Derrida and Judith Butler, the thesis argues that the global ethical responsibility we find within R2P emanates from a foreclosing structure of address. This foreclosing structure of address fails the promise of cosmopolitan protection by denying or failing to account for its own ‘internal’

¹ Report of the International Commission on Intervention and State Sovereignty. (2001). *The Responsibility to Protect*, International Research Development Center, Foreword.

irresponsibility, violence and inter-subjective/intra-subjective constitution. Through this lens, the ‘international community’ projects a self-assured collective self in terms of identity, legality/illegality and sovereignty, and transforms global ethical responsibility into a project of governance, management and control. It communicates a ‘duty of care’ that is based primarily on punishing violators of a liberal international order, rather than on recognition, protection and/or solidarity.

To turn the lens to ‘international political subjectivity’ has analytical and substantial value for international lawyers and policy-makers and for rethinking the theorizing of responsibility in international law. This is a radically different approach to ‘theorizing responsibility’ in international law from that taken by liberal internationalists and legal cosmopolitans. By exposing and acknowledging the *irresponsibility* of the responsibility to protect concept, this thesis argues that *irresponsibility* can become the condition of ethical responsibility.

NATO’s intervention in Kosovo in 1999 generated heated arguments among policy-makers, security officials, academics and international lawyers on a range of issues. From the legal justifications given, to the way in which NATO and its allies conducted the operation, to its effects on the ordinary lives of people at the time of intervention and its aftermath, the operation became the focal point of dialogues between lawyers, politicians and policy-makers alike.² Under the pleas of former Secretary-General Kofi Annan, the Commissioners were brought together to forge a new consensus or a common ground on how to approach these issues.³ R2P’s emergence can be seen as part of the broader institutionalization of human rights at the end of the Cold War, an active ‘human security’ agenda and of the ‘moral internationalism’ of major liberal international

² See for example Christopher Greenwood. (2002). Humanitarian Intervention: The Case of Kosovo, *Finnish Yearbook of International Law*, pp. 141-175, Jonathan I. Charney. (1999). Anticipatory Humanitarian Intervention in Kosovo, *American Journal of International Law*, Vol. 93, No. 4, pp. 834-841.

³ We the Peoples: the role of the United Nations in the twenty-first century, Report of the Secretary General, undocs.org A/54/2000.

institutions and policies.⁴ R2P swiftly became the *lingua franca* on the use of force for human protection purposes.⁵ Between 2009 and 2011 a joint office in New York for the special advisor for the Prevention of Genocide and Special adviser on R2P was created, along with the development of a “convening mechanism” and the establishment of a UN-wide “contact group” on R2P.⁶ Today, the responsibility to protect concept is arguably the dominant medium of inquiry with which international actors and organizations assess their response to mass atrocities and mass human rights violations. It is the dominant juridico-moral framework used to justify intervention for human protection purposes.

R2P entails the re-articulation of state sovereignty as ‘sovereignty as responsibility’ - sovereign states have a responsibility to protect their own citizens but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.⁷ It is comprised of three pillars: the responsibility to react, to prevent and to rebuild. In 2005, R2P was taken to the World Summit.⁸ The version of R2P adopted within the Summit Document Outcome (SDO) has been referred to as ‘R2P lite’.⁹ Broadly, it is the idea of ‘sovereignty as responsibility’ within R2P that has been celebrated as decisively solidifying the *collective responsibility* of the international community to respond to serious threats citizens face when individual states are unwilling or unable to

⁴ See for example Roland Paris. (2006). Human Security: Paradigm Shift or Hot Air?, *International Security*, Vol. 26, Issue 1, pp. 87-102, Taylor Owen. (2004). Human Security – Conflict, Critique, Consensus: Colloquium Remarks and a Proposal for a Threshold Definition, *Security Dialogue*, Vol. 35, No. 3, pp. 373-387, Anne Orford. (2013), Moral Internationalism and the Responsibility to Protect, *European Journal of International Law*, Vol. 24, Issue 1, pp. 83-108, David Levy and Natan Sznaider. (2004). The Institutionalization of cosmopolitan morality: the Holocaust and Human Rights, *Journal of Human Rights*, Vol. 3, Issue 2, pp. 143-157.

⁵ Christopher Hobson. (2016). Responding to Failure: The Responsibility to Protect in Libya, *Millennium: Journal of International Studies*, Vol. 44, Issue 3, pp. 433 – 454, p. 433 to 434.

⁶ Jennifer Welsh. (2013). Norm Contestation and the Responsibility to Protect, *Global Responsibility to Protect*, Volume 5, pp. 365-396, p. 366.

⁷ The concept ‘sovereignty as responsibility’ is generally attributed to former UN adviser for the Prevention of Genocide and former South Sudanese diplomat Francis M. Deng, see Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I. William Zartman (eds.). (1996). *Sovereignty as Responsibility: Conflict Management in Africa*, 1996, The Brookings Institution, Washington D.C, see also the influential article in *The Economist* by former Secretary-General Kofi Annan. (1999). Two Concepts of Sovereignty, *The Economist*, Retrieved from economist.com

⁸ World Summit Outcome 2005, [undocs.org A/RES/60/1](http://undocs.org/A/RES/60/1), 16 September, Articles 137 and 138.

⁹ Thomas G Weiss. (2007). *Humanitarian intervention: Ideas in Action*, Polity Press, p. 117 to 118.

fulfill their responsibility.¹⁰ The principle of state sovereignty and the prohibition not to use force in international relations are considered core norms of international law.¹¹ Although the Commission re-stated its respect for state sovereignty, the conception of ‘sovereignty as responsibility’ used by the ICISS drastically challenges the ordering principles of international law.¹²

Significantly, in 2007, R2P was used in Resolution 1769, which authorised the deployment of peacekeepers to the Darfur region of Sudan (UNAMID); and in 2011, the Security Council in Resolution 1973, used R2P for the first time to authorise member states to take all necessary measures, including military force, for the protection of civilians in the Libyan Arab Jamahiriya.¹³ France, the United States, the UK, Bosnia and Herzegovina, Colombia, Gabon, Lebanon, Nigeria, Portugal and South Africa voted in the affirmative and Brazil, Germany, India, China and Russia abstained.¹⁴ The intervention in Libya became a cause for celebration for pro-R2P advocates.¹⁵ In the words of Thomas Weiss: “Libya suggests that we can say no more Holocausts, Cambodias, and Rwandas – and occasionally mean it.”¹⁶ For others, R2P reflects the “dominance of the liberal peace thesis”¹⁷ or “bifurcates the international system between sovereign states...and de facto trusteeship territories.”¹⁸

¹⁰ Catherine Powell. (2012). Libya: A Multilateral Constitutional Moment?, *American Journal of International Law*, Vol. 106, Issue 2, pp. 298-316, p. 298.

¹¹ UN Charter Article 2(4) and Article 2(7), Christine Gray. (2008). *International Law and the Use of Force*, Third Edition, Oxford University Press, p. 30, Malcolm N. Shaw. (2008). *International Law*, Sixth Edition, Cambridge University Press, Chapter 3.

¹² ICISS report, *op cit.*, p. 8 to 9, emphasis on par. 1.34.

¹³ UNSCR 1769 (2007), undocs.org S/RES/1769, 31 July and UNSCR 1973 (2011), undocs.org S/RES/1973, 17 March.

¹⁴ Powell, *op cit.*

¹⁵ *Ibid.*, Anne-Marie Slaughter. (2011). Why Libya Sceptics were proved badly wrong. *Financial Times*, August 24, Alex J. Bellamy and Paul D. Williams. (2013). The New Politics of Protection? Cote d’Ivoire, Libya, and the Responsibility to Protect, *International Affairs*, Vol. 82, No. 7, pp. 825-850.

¹⁶ Thomas G. Weiss. (2011). RtoP Alive and Well after Libya, *Ethics & International Affairs*, Vol. 25, Issue 3, pp. 287-292, p. 291, see also Ramesh Thakur and Thomas G. Weiss. (2009). From Idea to Norm – and Action?, *Global Responsibility to Protect*, Vol. 1, pp. 22-53.

¹⁷ David Chandler. (2004). The responsibility to Protect? Imposing the ‘Liberal Peace’, *International Peacekeeping*, Vol. 11, No. 1, pp. 59-81.

¹⁸ Mahmood Mamdani. (2010). Responsibility to Protect or Right to Punish? *Journal of Intervention and State-Building*, Vol. 4, Issue 1, pp. 53-67.

The issue of military intervention for human protection purposes is a highly controversial and hotly debated issue within the disciplines of international law and international relations. Hence, this thesis benefits from the use of literature from both disciplines. Since its inception and subsequent institutionalization, R2P has been rapidly growing its own literature that bridges the disciplines of international law, international relations and security studies.¹⁹ Research around the concept assesses R2P's impact on international law;²⁰ its implications on international criminal justice;²¹ or its ethical or normative dimension and viability.²² This thesis is situated primarily within the latter group, however to assess R2P's ethical dimension and viability necessarily includes considerations both on its impact on international law and its relationship with international criminal justice. The thesis does not want to opt for a strict 'for or against' position, which either embraces the responsibility to protect concept as 'the only game in town' or dismisses it as a western liberal fixation. This thesis hopes to take a critical and cautious position.

Considering and reflecting on this chain of events, practices and rapidly emerging literature, this thesis attempts to explore what the collective responsibility within R2P professes, or promises, to be and how it materializes. To do so, the present thesis investigates the concept's institutionalization, its juridico-moral framework and how it has been used, both in theory and in practice. The aim of this research is to probe deeply into the meaning of 'responsibility' within R2P, as well as to examine the concept's role, effects and

¹⁹ There is a journal specializing in the study and practice of R2P, *Global Responsibility to Protect*, Editors Sara E. Davies and Luke Glanville and Chief Editor Alex J. Bellamy.

²⁰ For example Louise Arbour. (2008). The Responsibility to Protect as a Duty of Care in International Law, *Review of International Studies*, Vol. 34, No. 3, pp. 445-458, Anne Orford. (2011). *International Authority and the Responsibility to Protect*, Cambridge University Press, Maria Banda and Jennifer Welsh. (2010). International Law and the Responsibility to Protect: Clarifying or Expanding State's Responsibilities, *Global Responsibility to Protect*, Vol. 2, Issue 3, pp. 213-231.

²¹ For example Carsten Stahn. (2012). Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility', *Journal of International Criminal Justice*, Vol. 10, Issue 2, pp. 325-349, Frédéric Megrét. (2010). ICC, R2P and the International Community's Evolving Interventionist Toolkit, *The Finnish Yearbook of International Law*, Vol. 21, pp. 21-51.

²² For example Roland Paris. (2014). The Responsibility to Protect' and the Structural Problems of Preventive Humanitarian Intervention, *International Peacekeeping*, Vol. 21, No. 5, pp. 569-603, Aidan Hehir. (2013). The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect, *International Security*, Vol. 38, No. 1, pp. 137-159, Chris Brown. (2013). The Antipolitical Theory of the Responsibility to Protect, *Global Responsibility to Protect*, Vol. 5, Issue 4, pp. 423-442.

limits. Hereinafter the term ‘the responsibility to protect concept’ is to be used to signify the broader ‘idea’ – being the use of military force by the wider community of states to protect populations. The term ‘R2P’ specifically refers to the report of the ICISS, as well as subsequent UN documents, reports of Secretary-Generals and adjustments over time.²³

Approach and Methodology

Legal and political debates, as well as the discourse around R2P on the issue of military intervention for human protection purposes, have largely been preoccupied by the problematic and ethical dilemma of action or inaction. This dilemma suggests that there are only two possible scenarios when we are confronted with mass atrocities: either act and do ‘something’ or do nothing. Military intervention for human protection purposes was challenged both when it happened, for instance in Kosovo (1999) and Libya (2011), and also ‘where it did not happen’ in Rwanda (1994) and in Syria (from 2011 until today). The added emphasis on action/inaction or on the legal justifications of military interventions, as well as the dubbing of interventions as either a ‘success’ or ‘failure’ in relation to achieving state consensus or UN authorization, appear to me to have led to the downplaying of the important ways states routinely intervene or are implicated in the internal affairs of other states. In other words, such predilections marginalize the different and multiple ways ‘we’ are and have been, both as individuals and collectives, always related and active in each other’s lives. For example, through their mere sharing of financial and diplomatic ties or strategic geo-political priorities, their collaboration under regional security organizations, through the use of economic sanctions or other financial agreements, the selling and use of military technology and weapons, or through

²³ ICISS report, *op cit.*, Summit Outcome Document, *op cit.*, *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, un docs.org A/59/565 (2004), par. 29, 27 March, *In Larger Freedom: towards development, security and human rights for all*, Report of the Secretary General, undocs.org A/79/2005, 21 March, *Implementing the Responsibility to Protect*, Report of the Secretary General, undocs.org A/63/677 (2009), 30 November, *Implementing the Responsibility to Protect: Accountability for Prevention*, Report of the Secretary General, undocs.org A/71/1016 – S/2017/556 (2017), 10 August.

judicial intervention on criminal and corporate matters - states are active and routinely intervene in the relations of other states. This understanding has been a major, primary and enduring concern of mine in the process of putting together this thesis. Therefore, this thesis attempts to show that such a standpoint, the need to emphasize our everyday global interconnectedness and inter-subjective/intra-subjective constitution, is largely excluded from the discourse around R2P and from the discipline of international law in particular. Consequently, this thesis attempts to show the value of such an approach.

The ‘theorizing of responsibility’ in international law has been preoccupied with legal accountability and blameworthiness.²⁴ However, responsibility cannot merely be conceived as legal accountability, but is better understood as ‘an ability to respond’. ‘Response-ability’ emerges in a ‘scene of address’, within a relation and in the face of an encounter.²⁵ ‘Response-ability’ is partly formed by the form the ‘structure of address’ will take, which necessarily includes the mediation of language, of norms and of legal universals. This ‘scene’ is significantly a ‘space’ of constitution and of process. Within this ‘scene’, the subject not only recognizes, but also misrecognizes, fails to recognize or resists to extend recognition. Through this lens, both international law and the responsibility to protect are seen as *processes or spaces of communication and constitution and subject-formation*. This approach allows me to bypass the problematic dilemma of action/inaction, of legality/illegality, the predilection of international lawyers to legal individual accountability and to examine the ‘responsibility to protect concept’ from a wider theoretical, philosophical and socio-legal angle.

To this end, the above understanding would have been perhaps impossible without the primary reading of scholarly work, such as Immanuel Wallerstein’s

²⁴ Outi Korhonen and Toni Selkälä. (2016). Theorizing responsibility, in Anne Orford and Florian Hoffmann, (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, pp. 844-861.

²⁵ Judith Butler. (2005). *Giving an Account of Oneself*, Fordham University Press, Butler uses the ‘scene of address’ or ‘space of address’ interchangeably to situate the process of being addressed and addressing an Other.

world-systems analysis and his exegesis of the connection between the different forces at play within the world-system of global capitalism circa 1500.²⁶ Along with critical literature on human rights and international security, this thesis explores some of the paradoxes and ‘aporias’ of human rights and by extension the inherent paradoxes and ‘aporias’ within R2P itself.²⁷ Additionally, the approach of this thesis would lack important insights without the literature around the ‘history of international law’ and the work of Martii Koskenniemi.²⁸

I immersed myself in the reading and use of critical theory as I found it a fruitful way to interpret, theorize and understand contemporary global phenomena such as the ‘war on terrorism’, or the vision and limits of liberal internationalist and legal cosmopolitan approaches.²⁹ The use of the work of Jacques Derrida and Judith Butler contained within this thesis is a consequence of this engagement.³⁰ Furthermore, critical legal, critical IR theory and post-Hegelian ethics of recognition allowed me to think of both individual and collective subjects as historically and discourse situated selves, whereby identity *comes into being and always becomes* in relation to difference, otherness and normativity.³¹ In order to inquire on the meaning of responsibility, I treat the responsibility to protect

²⁶ Immanuel Maurice Wallerstein. (2004). *World-Systems Analysis: an introduction*, Duke University Press, Immanuel Wallerstein. (2011). *The Modern World-System: Capitalist Agriculture of the European World-Economy in the sixteenth century*, University of California Press.

²⁷ For example, Costas Douzinas. (2000). *The End of Human Rights*, Hart Publishings, Oxford, Tarik Kochi. (2009). *The Other's War: Recognition and the Violence of Ethics*, Birkbeck Law Press, Marc Neocleous. (2014). *War Power, Police Power*, Oxford University Press.

²⁸ Martii Koskenniemi. (2005). *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, Martii Koskenniemi. (2001). *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960*, Cambridge University Press, Gerry Simpson. (2004). *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press.

²⁹ Some influential readings have been those of Carl Schmitt, Jacques Rancière and Chantal Mouffe, see in thesis text for relevant references.

³⁰ Jacques Derrida. (1995). *The Gift of Death*, The University of Chicago Press, Butler, 2005, *op cit.*, other important works of Jacques Derrida and Judith Butler are also taken up in the Chapter but in these two works respectively, both Derrida and Butler provide a more coherent account on the relationship between moral agency (freedom and reflexivity), responsibility, subjectivity and normativity.

³¹ For example, David Campbell. (1992). *Writing Security: United States as Foreign Policy and the politics of identity*, University of Minnesota Press, Cynthia Weber. (1998). *Performative States, Millennium Journal of International Studies*, Vol. 27, No. 1, pp. 77-95, p. 92, Dan Bulley. (2009). *Ethics as Foreign Policy: Britain, the EU and the Other*, Routledge, Kate Shick and Patrick Hayden (eds.). (2016). *Recognition and Global Politics: Critical Encounters Between State and World*, Manchester University Press, Kochi, *op cit.*, Patchen Markell. (2003). *Bound by Recognition*, Princeton University Press.

concept as a social ‘practice’;³² and in this sense, morality and moral behaviour as a social product.³³ I think of the responsibility to protect concept as a ‘discursive framework’.³⁴ Through this lens, “responsibility practices” are also revealed to us as techniques of governance.³⁵ As such, this research contributes a critique of liberal cosmopolitan responsibility within R2P and an exploration into our resourcefulness for global ethical judgment.

Derrida’s work, especially with regards to the *Gift of the Death*³⁶, is a story of the many faces of responsibility in relation to religion, ideology, the ethical order and economic/legal rationality. Derrida is specifically concerned with the meaning of moral and ethical responsibility in Western religion and philosophy, as well as with the connection between religious ideology and economic/legal rationality. Derrida’s story (or history) of responsibility questions the relationship between self, other, absolute responsibility, general politico/legal responsibility and the ethical order. His work is important for this thesis because he exposes the significance of inter-subjectivity/intra-subjectivity in the moment of decision and encounter with the Other. Derrida cautions against teleological and foreclosing theorizations of the meaning of responsibility; in other words, of programmatic ethical responses. He unravels the significance of problematizing responsibility and subjectivity everywhere and every time. It is in this sense that Derrida’s deconstruction of responsibility is particularly useful as a methodological lens which aims to overcome programmatic or static ethics in relation and attached to notions such as the everchanging and elusive ‘international community’ and ‘self’, as well as the ethical imperatives of community and self to the suffering Other(s).

As a juridico-moral framework, the responsibility to protect rationalizes practices of international protection and naturalizes, as this thesis argues, a foreclosing and self-assured framework of ethical relationality aimed at the protection of life

³² Scott Veitch. (2007). *Law and Irresponsibility: On the legitimation of human suffering*, Routledge-Cavendish, p. 37.

³³ Zygmunt Bauman. (1989). *Modernity and the Holocaust*, Polity Press, p. 175.

³⁴ Michel Foucault. (1972). *The Archaeology of Knowledge and the Discourse on Language*, translated by A. M Sheridan Smith, Pantheon Books, New York, pp. 31-49, Chapter 2: Discursive Formations.

³⁵ Veitch, *op cit.*, p. 41.

³⁶ Derrida, 1995, *op cit.*

that is oriented towards governance, management and control rather than solidarity. The question of subjectivity is significant in this respect. The Derridean lens offers a conception of subjectivity grounded in a responsibility towards *every* Other and, much more importantly, always problematizing the space and rationality of mainstream notions of responsibility everywhere. His work provides the basis for a poststructuralist ethics which opens up the space of community and of re-theorizing *being-with* providing “the potential to recast the political on the basis of our responsibility to respect *the event of the decision*”³⁷, “to judge, analyse, to make decisions in the context of an event”.³⁸ This responsibility “can be linked to a notion of radical interdependence, in which the ethics of intersubjectivity are in the foreground”³⁹ against a conception of responsibility that is grounded on the territorialisation of responsibility: on state sovereignty, citizenship and nationality and even on professional, vicarious and role responsibility. Put simply, the Derridean lens offers a methodological framework that is a counter-narrative to a self-assured cosmopolitan juridico-moral framework that does not include, dismisses or is not interested in the misrecognitions, violence and irresponsibility of its protection practices.

In a similar vein, Butler’s work, especially with regards to *Giving an Account of Oneself*,⁴⁰ provides poststructuralist ethics the possibility of hope. In irresponsibility, in the failure of recognition, the elusive, everchanging and ungrounded community and self must always interpret their own socially constituted ethical position in the moment of decision. The notions of ‘international community’ and ‘international self’ are not mere effects or carriers of social structures. Drawing on Foucault’s reflexive relation of the subject to norms, Butler pluralizes the notions of identity, of sovereignty, of self and community to ground a notion of responsibility in the recognition of

³⁷ E. Jeffrey Popke. (2003). Poststructuralist ethics: subjectivity, responsibility and the space of community, *Progress in Human Geography*, Vol. 27, Issue 3, pp. 298-316, p. 307, see also Roxanne Lynn Doty. (1997). Aporia: A critical exploration of the agent-structure problematique in International Relations Theory, *European Journal of International Relations*, Vol. 3, Issue 3, pp. 365-392.

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 307, referencing David Slater. (1997). Spatialities of power and postmodern ethics – rethinking geopolitical encounters, *Environment and Planning D: Society and Space*, Vol. 15, pp. 55-72.

⁴⁰ Butler, 2005, *op cit.*

misrecognition which is inescapably bounded with critique. In this sense, the international self and community, as well as its responsibility to the Other(s), are infinitely re-constituted through the subject's critical deliberation offering us the possibility of hope and against a Kantian conception of an autonomous subject of political reason. The critical international self which emerges can be the academic, the student, the UN worker, the international lawyer, the discourse-situated subject that reflexively problematizes its relation to codes of responsibility and the ethical dominant order when taking a decision and everywhere. The 'we' of the 'inter'-national community and of law emerges as an amalgam of a body of practices, of institutions, codes of conduct and ethics and as a perhaps a consciousness in its own of the in between, that 'inter' of the international.

As the aim of this thesis is to *re-cognize* the notion of responsibility within the responsibility to protect concept, the thesis begins with the concept's institutional framework, moves to current notions of responsibility one finds in the R2P discourse in relation to just war thinking and its ethics, and finally looks at the importance of subjectivity and critical deliberation in theorizing responsibility in international law. The methodological approach of this thesis arrives from a poststructuralist vantage point and is a critical approach since it approaches international law and moral arguments within international law as "languages" and as a "grammar".⁴¹ The reading and analysis of the responsibility to protect concept presented in this thesis situates the thesis within a critical legal literature which inquires: (1.) on manifestations and representations of power and authority in the texts and sources of international law, and (2.) on the violence and militarization of liberal cosmopolitan responses to large scale loss of life.

'Critical theory' typically attempts to challenge "established modes of thought and action" and claims "a desire to explore and perhaps foster the possibilities

⁴¹ Koskenniemi, 2005, *op cit.*, p. 7.

being foreclosed or suppressed by that which exists or is being put in place.”⁴² Critical legal theory does not provide blueprints or programmatic policies to be worn as straightjackets for the purposes of ‘ending of mass atrocities’, suffering or violence ‘once and for all’ and has been criticized precisely for this.⁴³ Rather, such approaches to international law and global security apparatuses draw on the limits of visions, programs or policies that take as given ontological and epistemological assumptions on the nature of human life or human rights. Its target is not the international order but the production of ordering systems and principles, which cannot acknowledge their own limits of intelligibility. Possibilities might then emerge precisely from the process of undoing, of exposing these limits.⁴⁴ Likewise, this thesis attempts *to rethink* the responsibility to protect concept in terms of a relation that builds upon the conditions, albeit uncertain and unfixed, that bring moral subjects into being. It aims to show how the understanding of the responsibility to protect concept as a ‘structure of address’, whereby identities, meanings and courses of action take place, a broader ‘scene of address’ of global inter-subjective/intra-subjective constitution can be captured.⁴⁵ Even if the ICISS claimed in its report, a desire to inquire on the appropriateness of the use of force, it focused instead on the legal and procedural dimension of the use of force for human protection. As Campbell points out, the question ‘*why fight?*’ implies a series of “second-order questions, of *when*, *where* and *how*, or *who with* and *what with*, one should fight.”⁴⁶ An inquiry into military intervention for human protection purposes cannot be abstracted from its contemporary social context, yet nor from the material and historical spaces we emerge from and frame such moral questions. The central ethical question is not

⁴² David Campbell. (2005). Beyond Choice: The onto-politics of Critique, *International Relations*, Vol. 19, Issue 1, pp. 127-134, p. 128, derives the terms ‘onto-political’ from William E. Connolly, *The Irony of Interpretation*, in Daniel W. Conway and John E. Seery (eds.). (1992). *The Politics of Irony: Essays in Self-Betrayal*, New York: St Martin’s, p. 133.

⁴³ See for example Beate Jahn. (1998). One Step Forward, Two steps Backward: Critical Theory as The Latest Edition of Liberal Idealism, *Millennium: Journal of International Studies*, Vol. 27, Issue 3, pp. 613-641 and Ntina Tzouvala. (2016). New Approaches to International Law: The History of a Project, *European Journal of International Law*, Vol. 27, No. 1, pp. 215-233.

⁴⁴ It is deliberately that I do not term the methodology as ‘deconstruction’. I have been fortunate to read Jacques’s work at a later stage of my research.

⁴⁵ In *Giving an Account of Oneself*, op cit., Butler uses the ‘scene of address’ or ‘space of address’ interchangeably to situate the process of being addressed and addressing an Other.

⁴⁶ David Campbell. (1998). Why Fight: humanitarianism, Principles and Post-structuralism. *Millennium Journal of International Studies*, Vol 27, No. 3, pp. 497-521, p. 520.

why a decision to intervene is better than a decision not to or vice versa, but rather *how is it that we arrive at a decision*.⁴⁷ This thesis attempts to argue that the global ethical responsibility we find within R2P and the discourse that supports its concept emanates from a ‘foreclosing’ structure of address. Such a foreclosing structure fails the promise of protection at an inter-subjective/intra-subjective level and transforms global ethical responsibility into a project of governance, management and control. This vantage point is one on which the ‘international community’ of liberal international law and legal cosmopolitanism projects a self-assured self and fails to account for the limits of its own self-understanding, irresponsibility and violence. Even though both liberal internationalist and legal cosmopolitan approaches claim a desire to surpass the confines of state sovereignty, their visions of universal jurisdiction are severely limited by precisely a predilection to individualism and state-centrism, simplicity over complexity and “comfort” over “discomfort”.⁴⁸ To sustain this argument, a ‘notion of irresponsibility’ within and in relation to the responsibility to protect concept is developed. Significantly, this *irresponsibility* is internal; it is the other of responsibility and not a state of exception. It is generated from existing social modes of organization and of thinking. Such an understanding of irresponsibility allows me to *re-cognize* collective responsibility practices and the moral agency of the very nebulous ‘international community’ from which R2P depends. The ‘notion of irresponsibility’ within R2P works as a “performative contradiction”, “a kind of ‘talking back’” to its discourse.⁴⁹ It exposes and acknowledges the ‘limits’ of R2P and as such, it can become a conceptual resource for re-imagination,⁵⁰

⁴⁷ Orford, 2011, *op cit*, Costa Douzinas. (2007). *Human Rights and Empire: The political philosophy of cosmopolitanism*, Routledge-Cavendish, Vivienne Jabri. (1998). Restyling the Subject of Responsibility in International Relations, *Millennium Journal of International Studies*, Vol. 27, no. 3, pp. 591-611, Jenny Edkins, Nalini Persram, Véronique Pin-Fat, (eds.). (1999). *Sovereignty and Subjectivity*, Lunne Rienner Publishers.

⁴⁸ Christine Schwöbel. (2013). The Comfort of International Criminal Law, *Law and Critique*, Vol. 24, Issue 2, pp. 169-191, p. 169, Danilo Zolo. (1998). Hans Kelsen: International Peace Through Law, *European Journal of International Law*, Vol. 9, pp. 306-324, Nick Vaughan-Williams. (2007). Beyond a Cosmopolitan Ideal: the Politics of Singularity, *International Politics*, Vol. 44, pp. 107-124.

⁴⁹ Judith Butler. (1997). *Excitable Speech: A Politics of the Performative*, Routledge, New York and London, ‘resignification’ according to Butler is “a kind of talking back” to a dominant discourse, a re-contextualization of words, p. 14.

⁵⁰ Matthew Nicholson. (2015). Walter Benjamin and the Re-Imageination of International Law. (2016). *Law and Critique*, Volume 27, pp. 103-129, Nicholson uses ‘re-imagination’ instead of re-imagination, to draw attention to the question of *re-presentation* of an idea or image in Benjamin’s work, Gerry

“resignification”⁵¹ and representation. The ‘notion of irresponsibility’ presents the possibility to draw on meanings that have been excluded from the dominant juridico-moral concept of responsibility. The recognition of *irresponsibility* can also be seen as a site of discomfort: of “intellectual restlessness”.⁵²

Chapter Outline

Each chapter represents a ‘layer’ in the overall critique of R2P that this thesis provides. Broadly, the first two chapters frame the body of practice, theory and intellectual pedigree, as well as current understandings of the responsibility to protect concept.

Chapter 1 draws on the legal debates and historic events that led towards the institutionalization of R2P, as well as what the report of the ICISS includes within its scope. The historical trajectory of Chapter 1 covers the period from 1945 to 2011, from the creation of the UN Charter to resolution 1973 which authorized the humanitarian intervention in Libya. A survey of post-1945 cases involving humanitarian justifications are used to illustrate the post-WWII legal consensus on the use of force and state sovereignty. The chapter explores the birth and expansion of peacekeeping and peace-enforcement operations under the office of the Secretary General and the Security Council. It also investigates the growing willingness of the Security Council to broaden the definition of ‘threats to international peace and security’ in order to address gross human rights violations as an international matter of concern. Additionally, Chapter 1 looks at the legal debates around humanitarian intervention both before and after the end of the Cold War. This trajectory facilitates the situating of significant changes of approach on the use of military force for human protection purposes of various international actors at the turn of the twenty-first century. It is a brief history of

Simpson. (2015). The Sentimental life of International Law, *London Review of International Law*, Vol. 3, Issue 1, pp. 3–29.

⁵¹ Butler, 1997, *op cit*, p. 14.

⁵² Schöwbel, *op cit*, p. 171 and 184.

R2P's institutionalization and progressive internalization and as such an essential 'layer' and piece of the critique of R2P which this thesis aims to develop.

Chapter 2 looks at the ways in which R2P, liberal internationalist and legal cosmopolitan accounts inherit the juridico-moral framework of just war theory.⁵³ The literature used in Chapter 2 is concerned with what is perceived as 'just war theory', its ethical underpinnings, modes of thinking and how it relates to R2P in order to make a primary assessment on the current internal logic of R2P.⁵⁴ 'Classical' approaches to just war theory perceive the punishment of wrongdoing as a just cause of war under the broader right of punishing violations of the law of nature and of the law of nations.⁵⁵ Following the end of WWII, the codification of the UN Charter, the Geneva Conventions and the Nuremberg principles, explicit justifications of using military force as punishment were largely banished.⁵⁶ The discussion and tension between 'classical' and 'contemporary' approaches to just war theory in relation to R2P, reveal the significant position that just war thinking holds as an ethico/political response to mass human rights atrocities and the use of force for protection.⁵⁷ In chapter 2, punishment is seen as the

⁵³ Michael Walzer. (1977). *Just and Unjust Wars: A moral Argument with Historical Illustrations*, Basic Books, Fourth Edition, Allen Buchanan. (2006) Institutionalizing Just War, *Philosophy and Public Affairs*, pp. 34, No. 1, pp. 2-38, Allen Buchanan and Robert O. Keohane. (2004). The Preventive Use of Force: A Cosmopolitan Institutional Perspective, *Ethics and International Affairs*, Vol. 18, pp. 1-22, Allen Buchanan. (2003). Reforming the international law of humanitarian intervention in J. L Holzgrefe and Robert O. Keohane (eds). (2003). *Humanitarian Intervention: Legal, Ethical and Political Dilemmas*, Cambridge University Press, pp. 130 – 173.

⁵⁴ Luke Glanville. (2013). *Sovereignty and the Responsibility to Protect: A New History*, University of Chicago Press, Nicholas Onuf, Conclusions: Elusive Distinctions, Epochal Changes, in Eric A. Heinze and Brent J. Steele (eds.), *Ethics, Authority, and War: Non-State Actors and the Just War Tradition*, 2009, Palgrave Macmillan US, pp. 239-252, Nicholas Rengger. (2013). *Just War and the International Order: The Uncivil Condition in World Politics*, Cambridge University Press.

⁵⁵ Simon Chesterman. (2003). *Just War or Just peace? Humanitarian Intervention and International Law*, Oxford University Press, Alex Blane and Benedict Kingsbury, Punishment and the Ius Post Bellum, Chapter 12, in Benedict Kingsbury and Benjamin Strauman (eds.). 2010. *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, Oxford University Press, David Luban. (2011). War as Punishment, *Philosophy and Public Affairs* 39, No. 4, pp. 299-330, Richard Tuck. (1999). *The Rights of War and Peace: Political Order and the International from Grotius to Kant*, OUP, Cian O' Driscoll. (2008b). *The Renegotiation of the Just War Tradition and the Right to War in the Twenty-First Century*, Palgrave Macmillan, Jean Bethke Elshtain. (2003). *Just War against Terror: The Burden of American Power in a Violent World*, Basic Book.

⁵⁶ Luban, 2011, *op cit.*, p. 315, Harry D. Gould, *What Happened to Punishment in the Just War Tradition?*, in Eric A. Heinze and Brent J. Steele (eds.), *Ethics, Authority, and War: Non-State Actors and the Just War Tradition*, 2009, Palgrave Macmillan US, pp. 73-100, Anthony F. Jr. (2009). *Punishment, Justice and International Relations: Ethics and Order after the Cold War*, Routledge.

⁵⁷ Alex, J. Bellamy. (2009). 'When is it Right to Fight? International Law and the *Jus ad Bellum*', *Journal of Military Ethics*, Vol. 8, Issue. 3, pp. 231-245, Generally on the historicism of Johnson's just war see

‘other’ side of protection. With the help of critical legal literature, this chapter argues that liberal internationalist, legal cosmopolitan approaches and contemporary approaches celebrating the reinvention of just war theory in R2P tend to hide the punitive ethos of just war theory and humanitarianism under the rubric of protection.⁵⁸ The use of military force for human protection purposes, war crime tribunals and economic sanctions can also be seen as punitive practices. However, the punitive ethos and dimension of military interventions for human protection purposes has been largely underexplored within the discipline of international law. Together, chapters 1 and 2 present the juridico-moral basis (i.e. the juridical and ethical framework) of the responsibility to protect concept.

In chapter 3, the separation and relationship between legal accountability (individual) and political responsibility (collective), as well as the agential materiality of the elusive ‘international community’, are examined.⁵⁹ Drawing on Scott Veitch’s *Law and Irresponsibility*, I begin to develop the notion of *irresponsibility* within R2P. For Veitch, three main features play a key role in producing irresponsibility and are “features of modern social forms of organization’ with their “attendant mentalities”.⁶⁰ These are: (1.) the division of labour and the significance of role responsibility, (2.) the meaning and effects of processes of individualization and (3.) the transference of responsibilities through the distinctions and combination of social systems.⁶¹ I treat these features as signifiers for ‘sites of irresponsibility’ within R2P. I then provide examples and work through the manner in which the disappearance of collective, political and moral responsibility become possible within R2P. For example, to illustrate the significance of role responsibility, I use the story of Francis M. Deng, in his role as

discussion in the *Journal of Military Ethics* entitled ‘James Turner Johnson and the Recovery of the Just War Tradition’, Vol. 8, Issue. 3, 2009.

⁵⁸ Simpson, 2004, *op cit.*, Douzinas, 2000, *op cit.*, Neocleous, *op cit.*, Kochi, *op cit.*

⁵⁹ Toni Erskine. (2003). Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States, in Toni Erskine (eds.). *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*, Palgrave Macmillan, pp. 19-40, Hannah Arendt. (2003). *Responsibility and Justice*, Edited by Jerome Kohn, Schocken Books, New York, p. 151.

⁶⁰ Veitch, *op cit.*, p. 41.

⁶¹ *Ibid.*

the UN Representative for IDPs and his later role as the UN ambassador for South Sudan. I explore ‘sovereignty as responsibility’ to demonstrate the effects and meanings of individualization and turn briefly to the effects of military interventions in Iraq and Libya to sustain my argument. Finally, I look into the ‘transference of responsibilities’ within R2P and I explore the normative inconsistencies of R2P, as well as its relationship with the ‘comfort’ that ICL provides, with specific emphasis in transitional justice mechanisms placed in Libya at the end of the 2011 intervention. Through the analysis of notions of responsibility (i.e. social, legal and political), the materiality of the ‘international community’ and examples of irresponsibility within the responsibility to protect concept, chapter 3 uncovers the internal sites of vulnerability, of misrecognition, of violence and of discomfort within the responsibility to protect concept that the mainstream discourse around R2P fails to account for. As a result, the chapter exposes the ‘irresponsible mentality’ that is an integral part of the concept’s structure of addressing mass atrocities. The chapter represents the heart of this thesis as it develops and builds a ‘notion of irresponsibility’ integral to responsibility practices; the other site, sight and scene of R2P.

Lastly, chapter 4 turns the lens to ‘international political subjectivity’. Such a ‘turn’ explicates the role of subjectivity in relation to notions of sovereignty, accounts of responsibility and approaches to international law. This chapter looks at a ‘crisis of representation’ at the heart of legal cosmopolitanism and international law.⁶² For liberal internationalists and legal cosmopolitans, inter-subjectivity/intra-subjectivity produces *anxiety* and *discomfort*, as it is at odds with the defining moment of international law that being state sovereignty, with legal rationality and individual accountability in particular.⁶³ Anxiety heightens in the face of an increasingly networked, multifaceted, inter-connected, digital reality, with multiple sites of command and systemic contradictions. In an effort

⁶² Richard K. Ashley and R. B. J Walker. (1990). Conclusion: Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies, *International Studies Quarterly*, Vol. 34, No. 3, pp. 367-416, Martii Koskenniemi. (2003b). What is International Law For?, in Malcolm D. Evans (ed.). *International Law*, Oxford University Press, pp. 89-114.

⁶³ Outi Korhonen and Toni Selkala, *op cit*.

to control and to maintain the “void”⁶⁴ of international political subjectivity, legal cosmopolitans and liberal internationalists rely largely on a progressive history of universal reason and of a unified common humanity to advance a cosmopolitan legal framework, hoping that the project of universal emancipation and the promise of cosmopolitanism still runs at the heart of IL.⁶⁵ Finally, drawing on the concepts of responsibility we can find in Jacques Derrida and Judith Butler, I attempt to think of our resourcefulness for global ethical judgement *with* Derrida and Butler. Butler’s and Derrida’s account of responsibility complement each other and “deterritorialize” responsibility.⁶⁶ Their account represents a linguistic or aesthetic turn on how one understands moral agency and responsibility. In this light, foreign policy, military interventions for human protection purposes and representations of the ‘international community’ both within and in relation to R2P are processes of constitution and of subject formation. Such an approach allows me to view the responsibility to protect concept as a ‘scene of address’ with a specific ‘structure of address’ and to assess what kind of global ethical responsibility is communicated by R2P in both theory and practice. Chapter 4 is the last and final ‘layer’ in the structure of the critique of R2P that this thesis provides.

⁶⁴ Peter Fitzpatrick. (2015). Ultimate plurality: international law and the possibility of resistance, *Inter Gentes: The McGill Journal of International Law and Legal Pluralism*, 1 (1), pp. 3-22, see also Peter Fitzpatrick. (1992). *The Mythology of Modern Law*, Routledge London and New York, the reference to the ‘void’ is made in Anthony Carty. (1997). Myths of International Legal Order: Past and Present, *Cambridge Review of International Affairs*, Vol. 10, Issue 2, pp. 3-22, p. 10.

⁶⁵ Fernando R. Tesón. (2003). *The Liberal Case for Humanitarian Intervention*, in J. L. Holzgrefe and Robert O. Keohane, (eds.), *Humanitarian Intervention: Ethical, Legal, Political Dilemmas*, Cambridge University Press, pp. 93-129, David Held. (2010). *Cosmopolitanism: Ideals and Realities*, Polity Press, Cambridge.

⁶⁶ David Campbell. (1994). The Deterritorialization of Responsibility: Levinas, Derrida, and Ethics, *Alternatives: Global, Local, Political*, Vol. 19, No. 4, pp. 455-484.

CHAPTER ONE

FROM HUMANITARIAN INTERVENTION TO THE RESPONSIBILITY TO PROTECT

Introductory Remarks

This chapter aims to narrate the story of the development of R2P. Hence, the UN Charter, which sets the fundamental rules on the use of force among states, is a logical departure. The chapter progresses chronologically. This brief historical trajectory begins in 1945, from the creation of the UN Charter, and ends in 2011, when the Security Council in Resolution 1973 used R2P for the first time to authorise member states to take all necessary measures, including military force, for the protection of civilians in the Libyan Arab Jamahiriya.⁶¹

During the Cold War, the responsibility for the protection of individuals and their rights was considered an internal matter. Nonetheless, state sovereignty even in the early years of the Organization was not a *carte blanche*. During this time, a body of proper practice and guidelines also emerged for the management of conflicts through peacekeeping operations and from within the executive offices of the UN and the office of the Secretary-General in particular. Peacekeeping operations were the invention of the period roughly between 1960-1988 as a response to the deadlock of the Security Council and the power politics of the Cold War. These operations, under the auspices of the UN, evolved from being merely operations monitoring borders and observing cease-fires to peace-enforcement operations. The principles of consent, impartiality and self-defence were increasingly being compromised. In the 1990s, the ethico-political claim that military action to protect human rights was not only legal but morally *necessary* re-emerged with much greater force and standing. At the same time, the disciplines of international law and international relations saw the 'spring' of liberal/legal internationalism, cosmopolitanism and their discourses. The willingness to intervene for the protection of human rights was there both

⁶¹ UNSCR 1973 (2011), [undocs.org S/RES/1973](https://undocs.org/S/RES/1973), 17 March.

institutionally and discursively, yet the exact legal/normative justifications were lacking. In the aftermath of Kosovo, the issues that the ICISS was called to assess were broadly: the tension between the Charter prohibitions and the protection of human rights, the threshold criteria for humanitarian interventions, right authority and operational principles.

The chapter begins with a discussion on the provisions of the UN Charter and the development of human rights. Both provisions of the Charter and developments in relation to human rights are important; R2P is a juridico-moral framework. It seeks to provide, under threshold criteria, a 'right' to the broader community of states under the authority of the Security Council to use military force (juridical), in order to protect populations from mass human rights atrocities (moral). Roughly, it is an international legal doctrine, which seeks to organize the proper conduct of the broader community of states in response to 'large scale loss of life'. In relation to the choice of structure of this thesis, the aim of the first chapter is to locate along a timeline, significant changes of approach in relation to the use of force for the protection of human rights, and to briefly trace the developments that foregrounded the institutionalization and internalization of the responsibility to protect concept and its vision.

a. Dual promise: Rights of States and Rights of Individuals at the end of WWII

The construction of an international institution was thought to be the solution to the centuries old impasse around a question namely, how should international relations be organised? In the words of former US President Truman, such an organisation must be a "mighty combination of nations founded upon justice for peace"⁶². As World War II was coming to an end, there was a perceived need within the Allied circle to unite a disintegrated Europe, provide justice for the victims, allocate power and agree on fundamental rules governing international

⁶² President's Truman's address to the opening session of the United Nations conference on International Organization at San Francisco, April 25, 1945, Retrieved from ibiblio.org.

conduct and authority. At his address to the opening session of the San Francisco Conference, on April 25 1945, former US President Truman announced:

“Nothing is more essential to the future peace of the world than continued cooperation of the nations which had to muster the force necessary to defeat the conspiracy of the Axis power to dominate the world. While these great states have a special responsibility to enforce the peace, their responsibility is based upon obligations resting upon all states, large and small, not to use force in international relations except in defence of law. The responsibility of the great states is to serve and not dominate the peoples of the world.”⁶³

The United Nations, like its predecessor (League of Nations), was to be universal in character, but much more inclusive to both its members and the matters it took under consideration. It was the second attempt in the history of international law to form the much-acclaimed ‘international community’ of sovereign nation-states. The creation of the UN Charter in 1945 represents an effort to set the rules governing the relations between modern states, in the form of a constitution-like document. Truman’s remarks on the ‘responsibility’ of the ‘great states’ to protect international peace are nowhere more apparent than in the composition and form of the United Nations Security Council itself. For the ‘big three’ – the US, UK and USSR, under increasing nuclear armament, nothing was more serious than establishing some codes of conduct between themselves.

The UN Charter can be seen as an attempt to postulate the state and its mechanisms to the forefront of international law.⁶⁴ Under the Charter, the primary responsibility of the nation-state is not to use force except in self-defence.⁶⁵ On the other end, the Charter stages the organisation’s commitment to the individual and its inalienable freedoms:

“We the peoples of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...”⁶⁶

State sovereignty and sovereign equality on one end, and the commitment to fundamental human rights on the other, can be read as a *dual promise*. Whilst

⁶³ *Ibid.*

⁶⁴ UN Charter, 26 June 1945, Article 2(1).

⁶⁵ UN Charter, Article 2 (4) and 2 (7).

⁶⁶ UN Charter, Preamble.

the former concerns the rights of states, the latter promises to respect the rights of individuals.

The UN General Assembly (UNGA) passed the Universal Declaration of Human Rights (UNDHR) in 1948.⁶⁷ The UNDHR, a non-binding agreement, became the stepping-stone for more than eighty international human rights treaties and conventions. The principal “organs” of human rights are the UN Commissioner of Human Rights, the Human Rights Committee and the High Commissioner of Human Rights.⁶⁸ Further central developments of human rights law, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights - adopted by the UN General Assembly in 1966 but entered into force in 1976 - have gradually created, along with other conventions, what we name today in everyday parlance ‘human rights’.⁶⁹

Since the end of the nineteenth and until the turn of the twenty-first century, peoples around the world would struggle to break free from the yoke of colonialism. The legal roots of ‘the right to self-determination’ rest with the Mandate of the League of Nations at the end of World War I, to manage the transformation of the colonies into modern independent states.⁷⁰ The modern sovereign state was increasingly realized as a space “for the achievement of ‘ideal’ or good political and social arrangements.”⁷¹ The ‘right to self-determination’ drove the uprising of national liberation movements, which frequently took up arms to free themselves from ‘alien’ military subordination. Significantly, even if it is broadly considered a human right, the right to self-determination is not a right attributed to individuals, but to peoples. To this end, it is considered an

⁶⁷ See Universal Declaration of Human Rights (1948), Retrieved from ohchr.org.

⁶⁸ Jack Donnelly. (2003). *Universal Human Rights: Theory and Practice*, Second Edition, Cornell University Press, p. 129.

⁶⁹ See also the Convention on the Elimination of All forms of Racial Discrimination (1963), adopted 1969, the Convention against Torture (1984), adopted (1985) and the Convention on the Rights of the Child (1989), adopted (1990), Retrieved from ohchr.org.

⁷⁰ See Anglie Antony. (2005). *Imperialism, Sovereignty and the Making of International Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge.

⁷¹ Williams David. (2001). Aid and Sovereignty: quasi-states and the international financial institutions, *Review of International Studies*, Vol. 26, Issue 4, pp. 557-573, p. 557.

exception.⁷² Some scholars trace the “political origins” of the right to self-determination back to the American War of Independence and the “popular sovereignty” of the French Revolution.⁷³

Nonetheless, the twenty-first century ‘right of self-determination’ does not epitomize independence.⁷⁴ The right of self-determination was adopted by the UN to speed up and advance decolonization and was frequently based on ethnic/national or religious identity. The Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the United Nations General Assembly (UNGA) in 1960, was the “first significant contribution” in terms of granting and enforcing the right to self-determination.⁷⁵ Following the decolonization period, self-determination was seen as intertwined with the universal application of human rights and entwined with the notion of territorial integrity, statehood and the principle of non-intervention. Therefore, diplomats and lawyers stressed the need to limit the concept of self-determination at its “human rights role”, “of empowering individuals and minorities to equitable treatment within existing structures of authority”, rather than be seen in connection with decolonization and thus support secession.⁷⁶ A further analysis of the antecedents of the right of self-determination, and its changing meaning and effects in the course of the twentieth century is a very interesting task, yet beyond the scope of this chapter.⁷⁷

⁷² Donnelly, *op cit.*, p. 23.

⁷³ Daniel Thürer and Thomas Burri. (2009). Self Determination, *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, Retrieved from opil.ouplaw.com.

⁷⁴ Higgins Rosalyn. (1994). *Problems and Process: International Law and How we use it*, Oxford University Press, Oxford, p. 113.

⁷⁵ Thürer and Burri, *op cit.*

⁷⁶ Richard Falk. (2002). Self-determination under International Law: The coherence of doctrine versus the incoherence of experience, pp. 31-66, in Wolfgang Danspeckgruber (ed.). (2001). *The self-determination of Peoples: Community, Nation and State in an Interdependent World*, Lynne Rienner Publishings, p. 38.

⁷⁷ See for example Gerry Simpson. (2000). The diffusion of Self-Determination in the Post-Colonial Age, in Robert McCorquodale, (ed.) *Self-Determination in International Law*, Ashgate, also Anne Orford. (2003) *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, Cambridge University Press, pp. 126-157, Orford focuses on the meaning and effects of the right of self-determination and asks whether emancipation through self-determination can offer a counter claim to the ‘management practices underpinning international institutions’, p. 143.

The tradition of human rights, or the “intellectual pedigree of human rights” as Costas Douzinas observes, was not born out of a single event or mind, but was a blend of various events, ideas and traditions.⁷⁸ As Douzinas argues:

“classical natural law, Jewish and Christian Theology, the ideas of Enlightenment ...major events such as the French revolution and the American War of Independence, the Russian revolution and its aftermath, the Nazi and Stalinist crimes, the Holocaust and the universal revulsion it caused join with ‘less important ones’, like the preoccupations and priorities of Western (predominantly American) politicians to create what is called today ‘the human rights movement’.”⁷⁹

For Charles Beitz modern international human rights practice can be traced back to the Peace of Westphalia (1648) in its provisions limiting the sovereign rights of the German principalities through a collective guarantee of religious toleration, in the anti-slavery movement of the late eighteenth and nineteenth centuries and in “power interventions in the Ottoman Empire to protect religious minorities”.⁸⁰ It follows that human rights practice may also be traced in the Congress of Berlin of 1878 (religious liberty), in the Constitution of the International Labor Organization, as well as in the post-war “minority treaties”.⁸¹ Beitz’s historical trajectory of human rights is based upon “measures by which states limited their sovereign authority and committed to protect certain interests of individuals.”⁸² Nonetheless, in the twentieth century alone perhaps the ‘origin’ of an international (yet European) human rights movement can be found in the campaigns and advocacy of The Fédération Internationale des Droits de l’homme, established in Paris in 1922, a campaign advocating consistently for a “bill of human rights”.⁸³

The humanitarian catastrophe of the Holocaust and the events of World War II have arguably marked Western consciousness. Even today, reading about the death camps of the Third Reich, the systematic and organised intent to exterminate the Jewish, Romani and other populations off the face of the earth,

⁷⁸ Costas Douzinas. (2007). *Human Rights and Empire*, Routledge-Cavendish UK, p. 15.

⁷⁹ Douzinas, 2007, *op cit*, p. 15.

⁸⁰ Charles Beitz. (2009). *The idea of Human Rights*, Oxford University Press, p. 15.

⁸¹ *Ibid.*, p. 15 to 16, see also Martti Koskenniemi. (2004). *The Gentle Civilizer of Nations: The Rise and Fall of International Law*, Cambridge University Press.

⁸² *Ibid.*, p. 16.

⁸³ See the website of the *International Federation of Human Rights*, <https://www.fidh.org/en/>.

as well as the degree to which the institutionalisation of violence took place, yield a sense of despair. The traumas of the two World Wars, both physical and psychological, together with the obsession of the UK, the US and the Soviet Union to try and execute the prominent criminals and leaders of the Nazi regime for war crimes, led to the creation of a series of military tribunals, such as the Nuremberg Trials and Tokyo Tribunals.⁸⁴ The Nuremberg Trials was a concerted act by the ‘Great powers’ to establish international judicial action, limited to the ‘punishment of the major war criminals of the European Axis’.⁸⁵ The form and procedure that the trials took was considered largely before the end of the War in the meetings of Tehran (1943), Yalta (1945) and Potsdam (1945), leading to the London Charter of the International Military Tribunal (Nuremberg Charter or IMT), the decree, which operated as the legal basis for the trials. The Nuremberg Charter, an agreement solely made by the UK, the US, the Provisional Government of the French Republic and the USSR, ‘acting in the interests of all the United Nations’, identified three sets of crimes:

- a. **‘Crimes against Peace’**: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- b. **‘War Crimes’**: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- c. **‘Crimes against Humanity’**: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against civilian populations, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the

⁸⁴ For an analysis on the Tokyo Tribunals see Neil Bolster and Robert Cryer. (2008). *The Tokyo International Military Tribunal – A reappraisal*, Oxford University Press, Bolster and Cryer assert that the Tokyo Trials “did not meet the most elementary standards”, p. 114, see also Kevin Jon Heller and Gerry Simpson (eds). (2013). *The Hidden Histories of War Crimes Trials*, Oxford University Press, and Georg Schwarzenberger. (1950). The problem of an International Criminal Law, *Current Legal Problems*, Vol. 3, Issue. 1, pp. 263-296.

⁸⁵ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London 8, August 1945, Retrieved from icrc.org.

foregoing crimes are responsible for all acts performed by any persons in execution of such plan.⁸⁶

Apart from the definition of crimes, the Charter identified the independent judiciary of the Court and established the 'due process' of the trial, including the defendants' rights to counsel.⁸⁷ The codification of these crimes was based upon, and essentially developed, the customs and laws of war of the Hague Conventions of 1899 and 1907, which combined with the Geneva Conventions (drafted in 1949), became part of 'international humanitarian law'.

According to Danilo Zolo, the most important innovation of the Geneva Conventions was "universal jurisdiction", under which any party to the Convention could try individuals "irrespective of their nationality, the nationality of the victim, or where the crime was committed."⁸⁸ While crimes during war were, "normally considered less serious than the crime of aggression were prosecuted relentlessly and in some cases punished with great harshness", the crime of the war of aggression "has been systematically ignored."⁸⁹ For Danilo Zolo, it is the Great powers and their recourse to both "political" and "military force" that enabled them to criminalize and punish warfare; they "insisted that individuals, cited by name" be held responsible for acts of international aggression.⁹⁰ According to Zolo, the punishment of 'war criminals' was a key feature of the universal jurisdiction of the Holy Alliance, the League of Nations and the United Nations.⁹¹ However, it was not until after the end of WWII that individuals were to be prosecuted under international institutions. For legal cosmopolitans such as Hans Kelsen, 'individual penal responsibility' and international criminal courts are necessary developments for the achievement of a credible cosmopolitan organization for the maintenance of peace.⁹² Hence, in Kelsen's vision the maintenance of peace is dependant upon the idea of making

⁸⁶ *Ibid.*

⁸⁷ Richard Falk. (2011, November 23). A jurisprudence of Conscience: An international double standard is dividing the international community between the victorious and the defeated, *Al Jazeera*, Retrieved from aljazeera.com.

⁸⁸ Danilo Zolo. (2009). *Victor's Justice: From Nuremberg to Baghdad*, Verso Books, p. 30.

⁸⁹ *Ibid.*, p. 30 and 31.

⁹⁰ *Ibid.*, p. 22.

⁹¹ *Ibid.*, p. 24.

⁹² *Ibid.*

both states and individuals subjects in international law.⁹³ Richard Falk argues for three important ‘messages’ of the Nuremberg Trials with regards to the future of international law: (1.) the “procedural fairness” of the trials, (2.) evasions of victor’s criminality, and (3.) the “Nuremberg Promise”: “a commitment *in the future*” for the prosecution of individuals under international law.⁹⁴

The Genocide Convention on the Prevention and Punishment of Genocide, which was passed by a General Assembly resolution in 1948, defines genocide “in times of peace and in times of war”, as the “...acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group” establishing ‘genocide’ as an international crime.⁹⁵ The Convention arguably represents the first institutionalised departure from state practice and the concept of sovereign immunity. It entered into force in 1951 and lists, as of today, more than 140 parties.⁹⁶ The concepts of ‘crimes against humanity’ and ‘genocide’ were instrumental to the creation of the Statutes of the International Tribunal for the Former Yugoslavia (1993), the Statute of the International Tribunal for Rwanda (1994) and the Rome Statute of the International Criminal Court (1998) during the 1990s.⁹⁷

These pivotal developments in international human rights, humanitarian law and international criminal justice were part and parcel of events, intellectual traditions and existing structures of authority; narrowed down to the practicalities of acquiring consensus and of securing at least a working world organization with universal jurisdiction on the justifications of the use of force between states.

⁹³ *Ibid.*

⁹⁴ Falk, 2011, *op cit.*

⁹⁵ Convention on the Prevention and Punishment of Genocide, 1948, www.ochchr.org.

⁹⁶ See also Jan Palmowski. (2008). Geneva Conventions, *A Dictionary of Contemporary World History*, Oxford University Press.

⁹⁷ Adam Roberts. (2003). The United Nations and Humanitarian Intervention, in Jennifer Welsh (ed.). *Humanitarian Intervention and International Relations*, Oxford University Press, p. 75.

b. The UN Charter, the use of force and the ‘right of humanitarian intervention’

The rules governing the use of force in international law are predominantly derived from the concept of sovereignty in Western legal jurisprudence. The Peace of Westphalia (1648), a chain of treaties between European powers, ended the Thirty Year’s War. In both international relations (IR) and international law (IL) theory, it is widely thought, that the Peace legally installed a system of independent European nation-states. According to Leo Gross, it was an attempt “to establish something resembling world unity on the basis of states exercising untrammelled sovereignty over certain territories and subordinated to no earthly authority [the authority of the pope].”⁹⁸ For Gross, the Peace solidified the claim that for the “existence of the Law of Nations” the “preservation of a balance of power” is “a necessary condition”.⁹⁹ In this sense, the Peace is considered as the *endpoint* of imperial authority and anarchy, and the *origin* of the modern state system. However, for Stephen Krasner, Andreas Osiander and Benno Teschke, this understanding is a ‘myth’.¹⁰⁰ For Teschke, the disciplinary affinity to the Peace of Westphalia resembles a “constitutive foundational myth” of modern IR. In Teschke’s revisionist interpretation of the development and dynamics of the European state-system, Westphalia was “the culmination of the epoch of absolutist state formation” and dynastic politics but not the birth of modern international relations or modern international law.¹⁰¹

Through this lens, pinpointing the ‘origin’ of the modern-state system can be a rhetorical activity in itself. Likewise, a lot of the accounts which attempt to pinpoint the ‘origin’ of humanitarian intervention, do so in order to prove the existence of a customary ‘right of humanitarian intervention’, or of an ethical and

⁹⁸ Leo Gross. (1948). The Peace of Westphalia: 1648-1948, *American Journal of International Law*, Vol. 42, Issue 1, pp. 20-41, p. 20.

⁹⁹ *Ibid.*, p. 28.

¹⁰⁰ Stephen D. Krasner. (2001). Rethinking the sovereign state model, *Review of International Studies*, Volume 27, pp. 17-42, Andreas Osiander. (2001). Sovereignty, International Relations, and the Westphalian Myth, *International Organization*, Volume 55, No. 2, pp. 251-287, Benno Teschke. (2003). *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations*, Verso Books.

¹⁰¹ Teschke, *op cit.*, p. 2.

normative revolution in international relations and so ground a “future direction of internationalism” or “some final meaning of sovereignty” in relation to intervening to save strangers.¹⁰² However, given that the intentions of the interveners can never be proven, the ‘origin’ of such a ‘right’ will always be contested. What seems to matter is how interventions were represented, that being the justification given by interveners. For example, while most accounts trace the origins of ‘humanitarian intervention’ to the interferences in the Ottoman Empire in the nineteenth century,¹⁰³ Piirimäe suggests that the Swedish contemplated justifying their intervention in the Thirty Years War on humanitarian grounds, among other justifications, but decided eventually to take another route.¹⁰⁴ As the aforementioned accounts that are sceptical to the mainstream claim that the modern state-system emerged in Westphalia show, an attempt to locate the ‘origin’ of a ‘right to humanitarian intervention’ is also contestable. If we move the lens from state sovereignty, and substitute sovereignty with moral and political authority more broadly, we are presented with a wider historical trajectory of ‘humanitarian interventions’, humanitarian justifications and rationales. For example, Peter Hilpold suggests that the “challenge” of humanitarian intervention is much older than “the concept of ‘humanitarian intervention.’”¹⁰⁵ This is one reason that ‘humanitarian’ claims of the Just War tradition are discussed in chapter 2 of this thesis, which arguably precedes the concept of ‘state sovereignty’. The intention is not to prove a definition, or even a thesis, but to explore the juridical and moral connections

¹⁰² See Gerry Simpson. (2004). *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press, p. 11, in particular Simpson’s emphasis on J. Vasquez’s ‘a theoretical intellectual history with a point’ (i.e. the history of an idea and the role played by that idea in organizing global order), for Simpson accounts which use history to extract ‘some final meaning’ are definitions which are shallow and ahistorical, see also Simpson’s footnotes 24 and 25.

¹⁰³ This does not mean that those accounts are also supportive of the right of humanitarian intervention or are not cogent and nicely put together, but merely that the attempt to locate an ‘origin’ may also be a counterproductive or ‘rhetorical’ activity, see for example Gary J. Bass. (2008). *Freedom’s Battle: The origins of humanitarian intervention*, Knopf Doubleday Publishing Group.

¹⁰⁴ Pärtel Piirimäe. (2002). Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War, *The Historical Journal*, Vol. 45, Issue 3, pp. 499-523.

¹⁰⁵ Peter Hilpold. (2015). R2P and Humanitarian Intervention in a Historical Perspective, in Peter Hilpold (ed.). (2015). *The Responsibility to Protect (R2P): A New Paradigm in International Law*, Brill Nijhoff, p. 62, also turns to the ‘just war tradition’, “where a prince treated his people in a way that gravely offended public morals so as to incur the wrath of gods” as a justification for going to war, p. 64, see also Alex J. Bellamy. (2006). *Just Wars: From Cicero to Iraq*, Willey Press.

between R2P and just war theory. Now, in terms of the *linguistic* emergence of the term ‘humanitarian’, according to Simon Chesterman, ‘humanitarian intervention’ appears to have been used first by William Edward Hall in 1880.¹⁰⁶

Since we are focusing on a ‘right’ of humanitarian intervention the UN Charter is a logical departure. The UN Charter includes fundamental principles governing the use of force in international relations and sets out the principal organs of international authority. This is also the constitutional significance of the Charter. The authority to determine ‘a threat to peace and security’ and to decide on the proper application of the use of force in the relations between states is vested in the United Nations Security Council (UNSC) and the veto powers of the P-5. Article 103 of the UN Charter states: “In the event of a conflict between the obligations of Member States and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” With the creation of the UN Charter, the fundamental regulations enshrined in it, acquired a customary character in international law given the degree of acceptance by states, called *opinion juris*.

The most controversial, yet fundamental, article of the UN Charter prohibits the use of force in international law. Article 2 (4) provides:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

In a similar fashion, Article 2 (7) provides:

“Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but the principle shall not prejudice the application of enforcement measures under Chapter VII.”

Adam Roberts notes that the wording of Article 2 (7) (i.e. no intervention in internal affairs) is partly a result of British insistence.¹⁰⁷ According to Roberts, the

¹⁰⁶ Simon Chesterman. (2003). *Just War or Just peace? Humanitarian Intervention and International Law*, Oxford University Press, p. 24.

¹⁰⁷ Roberts, *op cit.*, p. 73.

British feared that the Charter would intensify the pressures to dismantle the British colonies.¹⁰⁸

Article 42 of Chapter VII (the ‘enforcement’ Chapter) offers discretion to the Security Council, if all other peaceful measures (Article 41) are inadequate to remove a threat to international peace and security upon its determination on such a threat and to authorize such use of force ‘as may be necessary to maintain international peace and security.’ The collective security system is premised upon the idea of *centralising the control on the threat or use of force* to the United Nations Security Council. The Security Council is the only organ that can determine a threat, breach of the peace or an act of aggression, the only exception being Article 51, which recognises the “inherent” right of self-defence if an armed attack occurs.¹⁰⁹

Christine Gray argues that states broadly agree to the strict prohibition not to use force. The ban on the use of force in international relations contained in Article 2(4), “is not only a treaty obligation but also customary law and even *ius cogens*, but there is no comparable agreement on the exact scope of the prohibition [emphasis my own].”¹¹⁰ In other words, the limits of the prohibition are unclear, however the prohibition acquired the status of fundamental character.¹¹¹ *Ius cogens* or *jus cogens*, is a Latin term that translates to ‘compelling law’ and denotes a set of *peremptory norms* of international public “policy” from which “no derogation is permitted”.¹¹² Various resolutions reiterated the prohibition on the use of force, for example the Declaration on Principles of International Law

¹⁰⁸ *Ibid.*

¹⁰⁹ For an analysis of the controversial powers of the Security Council on the use of force see Martti Koskeniemi. (1995). The Police in the Temple Order, Justice and the UN: A Dialectical View, *European Journal of International Law*, Vol. 6, pp. 325-348.

¹¹⁰ Christine Gray. (2008). *International Law and the Use of Force*, Third Edition, Oxford University Press UK, p. 30.

¹¹¹ For example, see Robert H. Jackson. (1990). *Quasi-states: Sovereignty, International Relations and the Third World*, Cambridge University Press.

¹¹² Malcolm N. Shaw. (2008). *International Law*, Sixth Edition, Cambridge University Press, Chapter 3, p. 123.

concerning Friendly Relations and Co-operation among States in accordance with the Charter.¹¹³

Nonetheless, the primary role that the Security Council holds or its special functions do not exclude International Court of Justice (ICJ) jurisdiction over cases on the law of the use of force.¹¹⁴ The cases of *Corfu*¹¹⁵ and *Nicaragua*¹¹⁶ before the ICJ are two such examples, in which the Court considered questions pertaining to a 'right of intervention' and the scope of the right to self-defence. In *Corfu* and *Nicaragua* there was no argument or justification put forward by either applicants, for a 'right to humanitarian intervention'. Yet, in both cases, force was used and justified in order to 'protect'. The Court, in both cases, was unwilling to widen its view of the scope of self-defence or of the prohibition not to use force.¹¹⁷

Corfu was the first ICJ case concerned with the use of force. Here, the UK demanded compensation for the explosions on October 12, 1946 from mines laid in Albanian waters, which subsequently damaged two British destroyers the *Saumarez* and the *Volage* which had come to its rescue, causing the death of 45 British officers. A month later, the British Navy performed a sweep of the Channel in Albanian waters, which had been swept and cross-swept before, to secure the mines as quickly as possible for fear they should be taken away by the Albanian authorities.

The Court considered two questions with regards to alleged violations and obligations under international law, and one regarding procedural and

¹¹³ General Assembly Resolution, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, undocs.org, A/RES/25/2625, 24 October 1970.

¹¹⁴ Marko Divac Öberg. (2006). The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ, *European Journal of International Law*, Vol. 16, no. 5, pp. 879-906.

¹¹⁵ *Corfu Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgement of April 9, 1949, Retrieved from icj-cij.org.

¹¹⁶ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Summary of Judgment of 27 June 1986, Retrieved from icj-cij.org.

¹¹⁷ See Christine Gray. (2013). The ICJ and the *jus ad bellum*, in Christian J. Tams and James Sloan. (eds.). (2013). *The Development of International Law by the International Court of Justice*, Oxford University Press, Gray points to the additional *Nuclear Weapons Opinion* and the *Wall Opinion* as evidence of the approach of the Court on the legality of the use of force and its scope and the *Oil Platforms case* and *DRC v. Uganda*.

compensational issues. The first question considered the argument presented by the UK, which alleged that Albania was responsible for the explosions that occurred on October 2 within the territorial sovereignty of Albania. The Court agreed that Albania was responsible because it failed to execute its duty to warn the ships proceeding through the Strait, which was considered “innocent” and thus “in times of peace” states “have a right to send their warships through straits used for international navigation.”¹¹⁸ Albania denied that the passage was innocent and alleged that the British warships “showed an intention to intimidate.”¹¹⁹ The second question the Court considered was whether the UK violated international law by its acts both when the explosions occurred in October and when the British Navy performed a sweep of the area in November. The Court held that while on October 2 the UK did not violate any international law by passing through the channel and into Albanian waters it did so on November 12/13, when it performed the sweep of the channel which was considered already cleared and had no responsibility to perform either. The court did not accept “a special application of the theory of intervention”, namely, that the UK was “acting to facilitate the task of the international tribunal”, or as a method of self-protection or self-help¹²⁰, by unilaterally performing a sweep of the area. The Court furthermore stated:

“The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.”¹²¹

The Court decided that by its actions on November 12/13, the British Navy used force in violation of the principle of territorial sovereignty in international law. If the UK had tried explicitly to argue that its acts on November 12/13 were performed for the interests of peace and security, falling under the general

¹¹⁸ *Corfu Case, op cit.*, p. 28.

¹¹⁹ *Ibid.*, p. 30.

¹²⁰ *Ibid.*, p. 34 and 35.

¹²¹ *Ibid.*, p. 35.

purposes of the UN Charter, the Court would not have considered that as an accepted defence.

In the case of *Nicaragua*, the government of the United States carried attacks on various fronts in Nicaragua including oil installations, military and naval bases; it had also supported the *contras*, paramilitary organisations which desired the fall of the government of Nicaragua including factions loyal to the former dictator, by training, arming and financing them.

The US government argued that the Court did not have jurisdiction due to its reservation with regards to multilateral treaties under the Statute of the Court. The Court dismissed the argument and affirmed its jurisdiction by considering customary international law as the applicable law.¹²² The US further justified its conduct as an exercise of the right of collective self-defence in response to the alleged assistance of the government of Nicaragua to combat insurgents in El Salvador.¹²³ However, the Court affirmed that one of the central tenets of the self-defence justification requires the government under 'armed attack' to issue a declaration requesting outside help. It also rejected their defence by establishing that the concept of an 'armed attack' does not include assistance to rebels both in the form of supplying weapons or logistical support, and considered the assistance to armed forces, which opposed the authority of their government and wanted to overthrow it, as an intervention in Nicaragua's internal affairs.

"The Court finds it clearly established that the United States intended, by its support of the *contras*, to coerce Nicaragua in respect of matters in which each State is permitted to decide freely, and that the intention of the *contras* themselves was to overthrow the present Government of Nicaragua... It therefore finds that the support given by the United States to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention."¹²⁴

The Court focused on *the prohibition of the use of force* as stated in the UN Charter in Article 2(4) and as inferred by customary international law, deducing

¹²² *Nicaragua, op cit.*, paras. 32-35.

¹²³ See the separate dissenting opinion of Judge Schwebel who considers the assistance given to the rebels by the government of Nicaragua was *legally tantamount to an armed attack* and that El Salvador called upon the United States to assist it in the exercise of collective self-defence.

¹²⁴ *Ibid.*, Paras. 239 to 245.

opinio juris particularly from resolution 2625 (xxv), the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.¹²⁵ It also invoked *the principle of non-intervention* and considered that intervention is unlawful as far as it involves that use of force in order to coerce, in the form of direct or indirect military action or in the form of direct support for subversive activities, within the sovereignty of another State. It also noted that state practice “does not justify the view that any general right of intervention in support of an opposition with another state exists in contemporary international law.”¹²⁶ Furthermore it added:

“The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology, or political system. Furthermore, the Respondent has not advanced a legal argument based on an alleged principle of ‘ideological intervention’.”¹²⁷

Notably, the Court suggested that human rights violations could not be monitored or ensured by using force. The Judge presiding the Court, Judge Nagendra Singh, insisted in a somewhat poetic character that:

“The contribution of the Court has been to emphasize the principle of non-use of force as one belonging to the realm of *jus cogens* and hence as the very cornerstone of the human effort to promote peace in a world torn by strife. Force begets force and aggravates conflicts, embitters relations and endangers peaceful resolution of the dispute.”

He further added: “The principle of non-intervention is to be treated as a sanctified absolute rule of law.”¹²⁸ Ultimately, both decisions demonstrate that a legal interpretation of the Charter cannot incorporate any special application of the right of self defence, or to consider a justification for the use of force in order to protect human rights or a *de facto* government that is in conflict with non-state actors within that state as a valid legal defence.

c. Legal debates on the use of force in the midst of the Cold War

Those that viewed the creation of the Charter as the dawn of new international relations guided by rules of non-intervention were devastated by the realities and

¹²⁵ *Nicaragua Case, op cit.*, paras. 187 to 201.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, paras. 239 to 245

¹²⁸ *Ibid.*, Separate Opinion of Judge Nagendra Singh, President of the Court.

events of the Cold War and of the effects of rapid decolonisation. Not only did Article 2 (4) proved to be a sort of a “dead letter” of sorts, but it also revealed the inherent politics of international law.¹²⁹ The indeterminacy and incoherence of the collective security system of the Charter became much more evident during the Cold War period and thus stretched and transformed the boundaries of international legal defense. Gray writes that the veto of the P-5 under Article 27 (3) was used 279 times between 1945 and 1985.¹³⁰ Through this lens, the language of the Charter and its principle of non-interference, as *jus cogens*, were too firm for the superpowers. Having little wiggle room, they attempted repeatedly to justify their proxy wars through the Charter.

The legal debates concerning the appropriate time to use force in international relations is structured around the Charter. Diplomats and international lawyers played with the meaning and wording of the Charter. Should Article 2 (4) be seen as a strict prohibition not to use force, or could it be interpreted under the wider Purposes of the UN Charter? Should human rights, the right to self-determination, or despotic and undemocratic regimes, be considered legitimate reasons to warrant intervention? As discussed earlier, the approval of related resolutions at the Security Council is said to generate, in time, customary international law and legal precedents. Or, simply put, if states carried out and successfully justified their interventions as ‘humanitarian’, perhaps, a ‘right’ of humanitarian intervention could be created. Indeed, during the very early years of the UN’s existence, the prevailing tendency among lawyers and diplomats was that unless an armed intervention was a necessary and proportionate application of military force in another state for reasons related to self-defence, any other use of force was generally deemed illegal. Quincy Wright stated in 1957 that “...self-help to rectify wrongs is a remedy only to the strong against the weak, and so is

¹²⁹ Thomas M. Franck. (1970). Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States, *American Journal of International Law*, Vol. 64, No. 5, pp. 809-837.

¹³⁰ Gray, 2008, *op cit.*, p. 255.

itself an injustice. Furthermore, the Charter puts peace before justice.”¹³¹ For Wright, intervention does not gain in legality by being multilateral as opposed to unilateral.¹³²

Nonetheless, within ten years from the creation of the UN Charter and indeed just ten years after the end of World War II, lawyers would increasingly stretch the international legal argument on the use of force and attack the *morality* of the prohibition rules in the name of human rights. Such a development showcases that the Charter was a necessary treaty for the Great Powers to regulate the use of force between themselves at that particular historical juncture and not some broader ‘conscious’ realization about the nature of violence and the suffering of war. The interventions of India in Pakistan (1971), Vietnam in Cambodia (1978) and Tanzania in Uganda (1979) were predominantly justified on grounds of self-defence; all of them, however, involved humanitarian rationales. According to Wheeler, India’s and Tanzania’s interventions were not condemned by the Security Council and Vietnam was only condemned because of the regional rivalry between Vietnam and China.¹³³ Michael Reisman had stated in 1984 that the prohibition of “Article 2 (4) was never an independent ethical imperative of pacifism”.¹³⁴ If it were not for the politics of the Cold War, the UN would have collectively enforced international protection from the ‘international community’ and would have “obviated” unilateral uses of force.¹³⁵

As early as 1967, Richard Lillich, argued *for* a right to ‘forcible self-help’ as a response to human rights violations, and that such a right to flow from post-charter customary international law and respect for human dignity. In arguing so, he identified a gap in the Charter, Lillich argued that until an agreement on the use of force for the protection of human rights was reached, “states with the

¹³¹ Quincy Wright. (1957). The Legality of Intervention Under the United Nations Charter, *Proceedings of the American Society of International Law at its Annual Meeting (1921-1969)*, (April 25-27), Vol. 51, published by the American Society of International Law, p. 84.

¹³² *Ibid.*, p. 85.

¹³³ Nicholas Wheeler. (2000). *Saving Strangers: Humanitarian Intervention in International Security*, Oxford University Press, p. 295.

¹³⁴ Michael Reisman. (1984). Coercion and Self-Determination: Construing Article 2(4), *American Journal of International Law*, Vol. 78, No. 3., pp. 642-645, p. 642 to 643.

¹³⁵ *Ibid.*

capability for action can be expected upon occasion to resort to the traditional right of self-help".¹³⁶ The legitimacy of the resort to force should be based upon criteria such as immediacy and proportionality.¹³⁷ Whilst he accepted that "other motives" may be present in deciding whether to resort to force, "if the overriding motive is the protection of human rights", forcible self-help should be a legitimate right.¹³⁸ Proponents of a right to humanitarian intervention often argue that the choice to resort to force is a choice between two extremes, namely, unilateral action or complete inaction. Hence, unilateral action is *at least legitimate and thus necessary* in the face of Security Council inaction, under certain threshold criteria such as those proposed by Lillich.¹³⁹ Nonetheless, there were also those international lawyers that continued to defend the non-intervention prohibition, especially in the midst of Cold War power politics and rhetoric. For Oscar Schacter, such normative adjustment allows superpowers to use force to overthrow governments "unresponsive to popular will", claiming that such an interpretation of Article 2 (4) "... is not, will not, and should not be law", "for interstate violence in a period of superpower confrontation and obscurantist rhetoric are ominous."¹⁴⁰

In 1989, the US invaded Panama (Operation Just Cause) in order to remove Panamanian leader Manuel Noriega. Noriega was the military ruler of Panama from 1983-1989, with whom the CIA had collaborated extensively before his coming to power. Noriega was found to have engaged in money laundering and drug trafficking. He was also accused of 'stealing' the 1989 elections and of murdering protestors. Among the justifications given for the invasion was the protection of democracy and human rights; other justifications were the protection of US citizens and combating drug trafficking. Antony D' Amato argued that the response to the abuse of human rights in Panama under Noriega,

¹³⁶ Richard B. Lillich. (1967-1968). Forcible Self-Help by States to Protect Human Rights, *Iowa Law Review*, Vol. 53, pp, 325-351, p. 351.

¹³⁷ See the criteria proposed by Lillich, *op cit.*, pp. 347 to 350.

¹³⁸ *Ibid.*, p. 350.

¹³⁹ *Ibid.*

¹⁴⁰ Oscar Schacter. (1984). The Legality of Pro-democratic Invasion, *American Journal of International Law*, Vol. 78, Issue. 3, pp. 645-650, p. 649.

was not only legal, but “morally required”, hence responsible. For D’ Amato, ‘tyranny’ is the monopoly of the use of force, and its use against “their own people” *necessitate* intervention; “human rights law *demand*s intervention against tyranny”.¹⁴¹ In contrast, Louis Henkin maintained that the invasion of Panama was a violation of Article 2(4).¹⁴² The creation of the Charter for Henkin indicates that the post-charter customary international law failed because of wars in the name of ‘vital interests’ and ‘just causes’. If, then, we legitimize pro-democratic invasions this would “...push back the law where it was long ago, as if the Second World War had not been fought and the United Nations Charter had not been written.”¹⁴³ Nonetheless, five years later, Louis Henkin would argue: “sovereignty is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology”.¹⁴⁴

d. Blurring the line: Peacekeeping, peace-enforcement or humanitarian intervention?

The initial idea of the founders of the UN Charter was to form a standing UN army for collective security purposes as provided in Article 43, to maintain peace and security around the globe and bring the authority to decide the ‘just’ implementation of force under the Security Council and the Charter. However, the major powers could not agree on a UN military force. The UN adjusted quickly to the realities of Cold War power politics and decolonization and relied on member states to provide the means on a voluntary basis when reacting to international crises.¹⁴⁵ Peacekeeping is an improvisation of Cold War bi-polarity, the Charter was supposed to deploy collective peace-enforcement operations.¹⁴⁶ Traditional peacekeeping, unlike ‘enforcement measures’, is mainly the result of

¹⁴¹ Antony D’ Amato. (1990). The Invasion of Panama was a Lawful Response to Tyranny, *American Journal of International Law*, Vol. 84, pp. 516-524, p. 519.

¹⁴² Louis Henkin. (1991). The invasion of Panama Under International Law: A Gross violation, *Columbia Journal of Transnational Law*, Vol. 29, pp. 293-312, p. 295.

¹⁴³ *Ibid.*, p. 312

¹⁴⁴ Louis Henkin. (1996). Human Rights and State “Sovereignty”, *Georgia Journal of International and Comparative Law*, Vol. 25, No. 1, pp. 31-45, p. 31.

¹⁴⁵ Marrack Goulding. (1993). The Evolution of United Nations Peacekeeping, *International Affairs*, Vol. 69, Issue 3, pp. 451- 464, p. 455.

¹⁴⁶ Department of Peacekeeping Operations. (2008). *United Nations Peacekeeping Operations: Principles and Guidelines*, undocs.org, p. 16 to 20.

institutional breakthrough in response to the deadlock of Cold War politics and the effects of proxy wars, between 1960 and 1988. These operations involved the monitoring of borders, observing cease-fires, and sometimes incorporated other civil society support mechanisms, aimed at “settling or defusing conflicts.”¹⁴⁷

Traditionally, the primary characteristics of this type of involvement are the principles of consent, neutrality/impartiality and the non-use of force, except in cases of self-defence. Peacekeeping operations have been called firstly ‘Chapter Six and a Half’ operations; because they fall in between Chapter VI, which is concerned with the peaceful settlement of conflicts, and Chapter VII, which includes the authority of the Security Council to take coercive measures to maintain peace and security. According to the United Nations Peacekeeping Operations (UNPO) the legal basis for peacekeeping operations are Charters VI, VII and VIII, not only Chapter VI. The feature of consent follows the rule of state sovereignty and territorial integrity. Furthermore, according to the UNPO, though the line between “robust” peacekeeping and peace-enforcement may appear blurred at times, peace-enforcement may involve “the use of force at the strategic or international level”, normally prohibited under Article 2(4) while peacekeeping allows the use of force at a tactical level’.¹⁴⁸

Yet, according to Orford, even if guided by impartiality, consent and the non-use of force, during the early years of peacekeeping activities, the UN clearly affected the internal struggle in the Congo (ONUC, 1960) by “recognizing particular authorities as collaborators”.¹⁴⁹ The political vacuum created by decolonization, coupled with the meddling of former colonies, led to violent ethnic/religious clashes that revealed the complications of keeping peace and taking decisions in the midst of conflict. As Orford observes, the Secretary-General in the Congo was

¹⁴⁷ See in William J. Durch. (2001). UN Peace Operations and the Brahimi Report, *The Henry L. Stimson Center*, p. 9.

¹⁴⁸ UNPO, *op cit.*, p. 19.

¹⁴⁹ Anne Orford. (2011). *International Authority and the Responsibility to Protect*, Cambridge University Press, pp. 80 to 83, esp. the financial assistance given to Mobutu and Cordier, which dismissed Lumumba, p. 84.

to decide between claimants to Congolese authority.¹⁵⁰ The Secretary-General thought proper to support the central government, which represented a turn in practice; the UN otherwise prevented both outside actors and did not favour either rebels or state authority.¹⁵¹ The relationship of the UN and the government of the Congo was ruined, as the UN refused to provide military assistance to the government, which looked to end the “Belgian-backed secession”.¹⁵² A year later, Secretary-General Hammarskjöld, stated that the UN had remained true to its principles and was guided by the interest of the Congolese people and by their right to decide freely for themselves.¹⁵³ According to Orford, in the aftermath of operations, Hammarskjöld avoided the most pressing and difficult questions pertaining to the power of UN executives to impose or dictate a future for the peoples of decolonized territories.¹⁵⁴ According to Orford, Hammarskjöld “characterized intervention as a temporary measure and administration as a form of rule with no effect on internal politics.”¹⁵⁵ Orford’s analysis points to the argument that even in the early years of peacekeeping, its ‘traditional’ principles (impartiality, consent and the non-use of force) could be practically and strategically compromised.

According to Shashi Tharoor, during the Cold War, peace-keeping was successful and it had found a way to work within the limitations imposed upon it by Great power contention.¹⁵⁶ It had worked “well enough, at any rate, to win the 1988 Nobel Peace Prize.”¹⁵⁷ The United Nations constantly refrained from providing a

¹⁵⁰ Orford, *op cit.*, pp. 72 to 87 and 11, the legal basis for the international executive role of the SG (decision-making) in crises is provided by Articles 97, 98 and 99 of the UN Charter, the GA entrusts functions to the SG (Art.98); the SG can perform an executive role (Art. 97) and can ‘exercise political responsibility’ (Art. 99). Orford suggests that this is the most important function of the SG and one that played an important role in the international management of conflict under the auspices of the UN. See further Dag Hammarskjöld, *The International Civil Servant in Law and in Fact* in (eds.), Wilder Foote. (1969). *The Servant of Peace: A Selection of Speeches and Statements of Dag Hammarskjöld*, The Bodley Head.

¹⁵¹ Orford, *op cit.*, p. 78.

¹⁵² *Ibid.*, p. 79.

¹⁵³ *Ibid.*, p. 85.

¹⁵⁴ *Ibid.*, p. 87.

¹⁵⁵ *Ibid.*, p. 88.

¹⁵⁶ Shashi Tharoor. (1995). *The Changing Face of Peacekeeping and Peace-Enforcement*, *Fordham International Law Journal*, Vol. 20, Issue 2, pp. 408-426, p. 410, At the time of writing Tharoor was the Special Assistant to the United Nations Under-Secretary General for Peacekeeping Operations.

¹⁵⁷ *Ibid.*

definition for the exact form of its peacekeeping activities. As Tharoor states: “to define peace-keeping was to impose a straight-jacket on a concept whose flexibility made it the most pragmatic instrument at the disposal of the world organization.”¹⁵⁸ It is interesting to note that superpower contention became a positive element for the internal management of peacekeeping activities early on. In fact, it seems that, because the nature of decision-making in the midst of conflict is such that requires promptness, Great power disagreement on an overall strategy in response to mass human rights violations was the condition for such administrative and managerial clarity from within. It was the increasing willingness of the Security Council to enforce the peace (i.e. ‘no fly-zones’, ‘safe-areas’, ‘punitive actions against warlords’, NATO-declared ‘exclusion zones’) that would blur the lines between peacekeeping, peace-enforcement and ‘humanitarian intervention’ and compromise the “body of practice” that peacekeeping had developed.¹⁵⁹ Through Tharoor, it was the decisions made by the Security Council in the 1990s, which produced major normative and conceptual problems. Therefore, the argument goes, if peace-keeping activities were to be left to the executive and inner administration circles of the UN, the body of practice would be able to transform in accordance with the demands of each case. According to Tharoor, writing in the aftermath of the NATO bombing in Bosnia in 1995:

“The irony of the “back to basics” appeal is that the United Nations had already moved successfully beyond the basics... Namibia... Cambodia... El Salvador... Mozambique were all multi-dimensional efforts that demonstrated the effectiveness of a broader concept of peace-keeping – one that combined military functions with a variety of largely civilian undertakings to bring about change and fulfill the objectives of the operation.”¹⁶⁰

From this point of view, Tharoor reinforces Orford’s analysis of the gradual increase but also broadening of the decision-making powers at the UN’s disposal.¹⁶¹

¹⁵⁸ *Ibid.*, p. 414.

¹⁵⁹ *Ibid.*

¹⁶⁰ Tharoor, *op cit.*, p. 412.

¹⁶¹ See generally Orford, 2011, *op cit.*

For Weiss, what should be distinguishing about ‘humanitarian interventions’ are the “explicit” and “prominent” humanitarian rationales.¹⁶² Yet, are not all military interventions supported through some humanitarian rationale? Further, are not all operations, in one form or another, interventions in the internal affairs of states? According to Adam Roberts ‘humanitarian intervention’ is “*coercive action* by one or more states involving the use of armed force in another state *without the consent* of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants.”¹⁶³ If such operations are granted authorization under Chapter VII (threat to the peace) they are widely considered peace-enforcement operations, which allow the use of military force. Arguably, through this lens, peace-enforcement and ‘humanitarian interventions’ are not to be seen as separate.

Between 1944 and 1988 only thirteen peacekeeping operations had been deployed, as opposed to the period between 1988 and 1994, where twenty-one such operations took place. The number amounts to the deployment of 79,9478 peacekeepers between 1988 and 1994, in contrast to 12,000 during the period between 1944 and 1988. These numbers exclude the 10,000 troops involved in ‘Operation Restore Democracy’ in Haiti (1994).¹⁶⁴ From 1992 until 1996 alone, “it is no exaggeration to talk of ‘the militarization of the international relief system’”.¹⁶⁵ As such, a conceptual problem that actually becomes a practical issue is the blurring of relief operations with military interventions for human protection purposes, through the language of protection. In other words, to march under the same banner (of protection) blurs the lines between the deliveries of aid (i.e. medical personnel, medical/food/shelter supplies) and the use of military force in the internal affairs of states for the purpose of protecting part of the population.¹⁶⁶ If both government and anti-government factions use

¹⁶² Thomas G. Weiss. (2007). *Humanitarian Intervention: Ideas in Action*, Polity Press, pp. 8 to 10.

¹⁶³ *Ibid.*, p. 8, this definition of humanitarian intervention is the most prominent one in the literature.

¹⁶⁴ Hugo Slim. (1996). Military Humanitarianism and the new Peacekeeping: An Agenda For Peace?, *IDS Bulletin*, Vol. 27, No. 3, pp. 86-95, p. 86.

¹⁶⁵ *Ibid.*

¹⁶⁶ Fabrice Weissman. (2010). “Not in Our Name”: Why Médecins Sans Frontières Does Not Support the “Responsibility to Protect”, *Criminal Justice Ethics*, Vol. 29, No. 2, pp. 197-210, in contrast to this

violence and armed force, the distinction between combatants, non-combatants and civilians is very difficult, if almost impossible.

In 1992, the “veto-free” Security Council, commissioned then Secretary-General Boutros Boutros-Ghali to provide recommendations for the strengthening of UN conflict management.¹⁶⁷ The result was the Secretary-General’s report *An Agenda for Peace*, in which the “right” of the UN and its Security Council, under Chapter VII, to protect populations from mass human right violations was emphasized and reaffirmed: “the time of absolute and exclusive sovereignty has now passed”.¹⁶⁸ All of these developments led to a period of humanitarian experimentation – Somalia, Yugoslavia, Cambodia, Mozambique, Rwanda, Angola – peacekeeping in the midst of civil wars and violence, increasingly ignoring and violating the three fundamental principles of peacekeeping: consent, impartiality and the minimal use of force.¹⁶⁹ Another significant development of the period was the launching of peacekeeping operations under the military command of a particular state or coalition and not under the UN itself. Such were the operations in Somalia (UNITAF) under the command of the US and the operation in Rwanda (Operation Turquoise) under France.¹⁷⁰ Arguably, these developments during the 1990s are to be considered momentous in relation to the emergence of R2P in the 2000s.

Today, UN peacekeeping operations from within the UN are called:

“multi-dimensional ... and may involve a mix of military, police and civilian capabilities ... helping to fill the security and public order vacuum that often exists in post conflict settings... [and] play a direct role in political efforts to resolve the conflict.”¹⁷¹

Significantly, the self-defence and consent component of ‘traditional’ peacekeeping were compromised over the years both from within the UN (peace-

viewpoint see the influential role of Bernard Kouchner, co-founder of the MSF, in the development of Droit d’ingérence (the right to interfere) in Tim Allen and David Styan. (2000). A right to interfere? Bernard Kouchner and the new humanitarianism, *Journal of International Development*, Vol. 12, Issue 6, pp. 825-842.

¹⁶⁷ Slim, *op cit.*, p. 87.

¹⁶⁸ *Ibid.*, see also Report , para 17.

¹⁶⁹ *Ibid.*, p. 90.

¹⁷⁰ *Ibid.*, p. 91.

¹⁷¹ UNPO, *op cit.*, p. 21 to 23.

keeping) and with regards to resolutions of the Security Council (peace-enforcement) and the use of 'all necessary means'.

e. The 1990s, the collective security system and the use of force for protection

Most scholars who have written on humanitarian interventions in the twentieth century agree that at the end of the Cold War a new dawn of international humanitarianism under the umbrella of the United Nations emerged.¹⁷² According to Adam Roberts nine cases between 1991 and 2000 showcase that the understanding of 'humanitarian intervention' as a distinct conceptual category was largely doubted.¹⁷³ In all of these cases, the use of force seemed the only alternative to accumulative violence; significantly, it is individual states and coalitions that deployed such military capacity.¹⁷⁴ These were the cases of (yet not limited to): Northern Iraq (1991), Bosnia and Herzegovina (1992-1995), Somalia (1992-1993), Rwanda (1994), Haiti (1994), Albania (1997), Sierra Leone (1997-2000), Kosovo (1998-1999) and East Timor (1999). In most of these cases host-state consent was given reluctantly; in Iraq, Somalia, Haiti and Kosovo there was no consent. Even if host-state consent were given, intervening forces would knowingly side-step agreements and take measures beyond those agreed.¹⁷⁵ For Roberts, "this is a record of activity going far beyond anything in the first forty-five years of the UN's existence."¹⁷⁶

Over the course of three years, between 1990 and 1993 alone, the Security Council passed more than 250 Resolutions on the matter, in contrast to the overall 250 resolutions of the period between 1945 and 1990.¹⁷⁷ From this perspective, we can

¹⁷² Michael Ignatieff. (2001). *Human Rights as Politics and Idolatry*, Princeton University Press, p. 95, Adam Roberts, *op cit.*, Martha Finnemore.(1996). Constructing Norms of Humanitarian Intervention, in Peter J. Katzenstein. (ed). (1996). *The Culture of National Security: Norms and Identity in World Politics*, Columbia University Press, pp. 153-185, Mary Kaldor. (2012). *New and Old Wars: organized violence in a global era*, Polity Press.

¹⁷³ Roberts, *op cit.*, p. 81.

¹⁷⁴ *Ibid.* p. 83.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*, p. 84.

¹⁷⁷ Sean Murphy. (1994). Security Council, Legitimacy and the Concept of Collective Security after the Cold War, *Columbia Journal of Transnational Law*, Vol. 32, pp. 202-288, p. 207.

surely establish an increasing willingness from the Security Council (often equated as the willingness of ‘the international community’) to use its functions, and in cooperation with UN peacekeeping administration, to *manage crisis situations, to morally condemn and punish gross human rights violations* that the Security Council brought to its attention. The Security Council between 1990 and 1993 attempted recurrently to “coerce target state behaviour”.¹⁷⁸ This is only after the Security Council, under Article 39 of the Charter, determines “a threat to international peace and security.”¹⁷⁹ Arguably, this remains to this day the most crucial and fundamental function of the Security Council’s moral and political international authority and security system. Between 1990 and 1993, the Security Council determined Iraq’s invasion of Kuwait (1990) as a breach of international peace and security and the repression of Iraqi nationals as a threat to the peace.¹⁸⁰ It declared that the escalation of conflict in Yugoslavia (1991) and violence in Somalia (1992) were also a “threat”.¹⁸¹ To this end, the Security Council increasingly considered gross human rights violations as such ‘threats’, therefore signifying a change in previous practice. According to Murphy, the concept of the ‘threat’ has progressed from its restricted reference to military violence, to a broader definition of threat.¹⁸² During the same period, Security Council resolutions included among other actions, the creation of specific zones as ‘safe areas’ which would become ‘safe havens’, and the supervision of aerial space which would become ‘no-fly zones’. Additionally, resolutions included actions with “legal effects”, “such as declaring the annexation of a territory null and void.”¹⁸³

Peacekeeping operations and experiments during this period, especially with regards to Somalia, where peacekeeping converted into peace-enforcement, significantly transformed the international management of conflict. These pivotal

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ UNSCR 660 (1990), S/RES/660 and 688 (1991), S/RES/688 undocs.org, on the situation in Northern Iraq see Eugene Rostow. (1991). Until What? Enforcement action or Collective Self-defense?, *American Journal of International Law*, Vol. 85, No. 3, pp. 506-516.

¹⁸¹ UNSCR 713(1991), S/RES/713 and 733 (1992), S/RES/733, undocs.org.

¹⁸² Murphy, *op cit.*, p. 210.

¹⁸³ *Ibid.*, p. 211.

developments created the impression that, not only the lines between peacekeeping and peace-enforcement were distorted, but that peacekeeping “may gradually make a partial or total shift away from being a global community function to more of a major power function.”¹⁸⁴ In May 1993, and after the highly controversial experiment in Somalia (the US withdrew and UNOSOM2 was found to be unable to control armed gangs and rebels), the Security Council issued a statement which effectively advocated for a “return” to peace-keeping founded on the principles of consent and impartiality. Nonetheless, it significantly retained its “right” to authorize all means necessary for UN forces to carry out their mandate when it sees fit.¹⁸⁵ As a result of the looming threat of the use of air force in order to contain the conflict in Bosnia (1995), the ideas of peace-enforcement and humanitarian intervention as ‘forces of good’ re-emerged.¹⁸⁶ However, the normative/legal justifications and concept to support “the overall strategy behind each new mandate” were still missing.¹⁸⁷ This was thought of as being a detriment to the UN’s overall credibility, as well as moral and political authority.

The ‘spring’ of liberal/legal internationalism

Within the discipline of international law, following the tradition of legal internationalism of scholars the likes of Hans Kelsen, Abraham Chayes and Louis Henkin, new theories of international legal practice developed. These theories, according to Anne Marie Slaughter, prioritized research that pinpointed on the ways law shaped state behaviour and pursued these objectives.¹⁸⁸ For Slaughter, like realism, liberalism must be thought of as “a comprehensive theory of the international system.”¹⁸⁹ This form of liberal internationalism builds upon the idea of liberal peace - liberal states are far less likely to go to war.¹⁹⁰ These states are the democratic ones: they have a market-economy, are based on private

¹⁸⁴ *Ibid.*, p. 222

¹⁸⁵ *Ibid.*

¹⁸⁶ Tharoor, *op cit.*, p. 413, see also Thomas G. Weiss. (1994). On the Brink of a New Era? Humanitarian Interventions (1991-1993), *The Brown Journal of World Affairs*, Vol. 1, No. 2, pp. 235-260.

¹⁸⁷ *Ibid.*, p. 414

¹⁸⁸ Anne-Marie Slaughter. (1995). International Law in a World of Liberal States, *European Journal of International Law*, Vol. 6, pp. 503-538, p. 503.

¹⁸⁹ *Ibid.*, p. 509.

¹⁹⁰ *Ibid.*

property rights and constitutional protections of civil and political rights.¹⁹¹ Likewise, according to this thesis, in the international realm, states and international lawyers should pursue more institutionalization, more centralization, while embracing the ‘human rights movement’ of international law. Some of these scholars pursued unapologetically “a world of liberal states” and the “disaggregation” of state sovereignty.¹⁹² Accordingly, this vision required a “redefinition” of state sovereignty. For Slaughter:

“The world of liberal states ...is a world of individual self-regulation facilitated by states; of transnational regulation enacted and implemented by disaggregated political institutions – courts, legislature, executives and administrative agencies – enmeshed in transnational society”.¹⁹³

This idea of an international legal order is supported by the ‘relative’ autonomy of individual states. Here, international administration mirrors domestic administration in the regulation of human life and activities. Other international lawyers who ascribe to this vision are Fernando Téson and Thomas Franck.¹⁹⁴ According to Téson: “the gradual dilution of state sovereignty is not just one historical phenomenon, one more stage in the unfolding of blind Laws of History over which we lack control. It is, rather, a moral imperative.”¹⁹⁵ Liberal internationalism in this sense rationalizes and naturalizes the universal administration of human activity and life. In the discipline of IR a similar wave of liberal ‘institutionalism’ had been gradually taking hold of the discipline.¹⁹⁶ ‘Cosmopolitan’ theorizing emerged around the same time.¹⁹⁷ It is an invitation and a vision from the *polis* to the *cosmopolis*, embracing, more or less, the same axioms and visions as their legal counterparts.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, p. 505, see also Michael Doyle. (1983). Kant, Liberal Legacies and Foreign Affairs, *Philosophy and Public Affairs*, Vol. 12, pp. 205-235.

¹⁹³ *Ibid.*, p. 538.

¹⁹⁴ see Thomas Franck. (1992). The Emerging Right to Democratic Governance, *American Journal of International Law*, Vol. 86, Issue 1, pp. 46-91.

¹⁹⁵ Fernando Téson. (1996). Collective Humanitarian Intervention, *Michigan Journal of International Law*, Vol. 17, pp. 323-371, p. 371.

¹⁹⁶ See for example, Robert Keohane. (1988). International Institutions: Two Approaches, *International Studies Quarterly*, Vol. 32, pp. 379-396, Robert Keohane and Lisa L. Martin. (1995). The Promise of Institutional Theory, *International Security*, Vol. 20, No. 1, pp. 39-51.

¹⁹⁷ See David Held. (1995). *Democracy and the global order: From the modern state to cosmopolitan governance*, Stanford University Press, Andrew Linklater. (1998). *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era*, University of South Carolina Press.

Kosovo

The NATO intervention in Kosovo in 1999 is perhaps the most significant in terms of demonstrating the debate over the legality and legitimacy of the use of force for human protection purposes. This is mainly due to the fact that there was no explicit Security Council authorization for such an intervention and it was the first ‘humanitarian intervention’ declared as such by the interveners. However, as we shall see, it was also tacitly accepted. The humanitarian catastrophes of Somalia, Rwanda and Bosnia, among others, were confronted, especially from liberal/legal internationalists, with anger; stressing the need for more ‘active’ and effective approaches to mass atrocities.¹⁹⁸ From within the UN the general sentiment was that of increasing ‘distrust’ towards the UN’s capability to respond to human rights violations and mass atrocity crimes around the globe.¹⁹⁹ At least this is how Secretary Generals Boutros Ghali and Kofi Annan translated the ‘international opinion’ to be as evidenced in their progress reports.²⁰⁰

In March 1998 the Security Council, acting under Chapter VII, demanded that the Former Republic of Yugoslavia (FRY) and the Kosovo Liberation Army (KLA) work towards a political solution, ordered an arms embargo and sanctions, and remained seized of the matter.²⁰¹ The situation deteriorated substantively with heavy civilian casualties and displacements. In September of the same year, the

¹⁹⁸ See generally Tésou, *op cit.*

¹⁹⁹ See Kofi Annan. (1999). Two Concepts of Sovereignty. *The Economist*, Retrieved from economist.com, see also the analysis of several peace-enforcement operations in the 1990s: Kuwait, Northern Iraq, Somalia, Rwanda, Haiti, and the role played by public opinion and media in Peter Viggo Jakobsen. (1996). National Interest, Humanitarianism, or CNN: What Triggers UN Peace Enforcement After the Cold War?, *Journal of Peace Research*, Vol. 33, No. 2, pp. 205-215.

²⁰⁰ *Ibid*, see also *An Agenda For Peace*, Report of the Secretary General, un.org A/47/277 (1992), *Supplement to An Agenda For Peace*, Report of the Secretary General on the work of the Organization, dag.un.org A/50/60 (1995), General Assembly resolution, *Supplement to An Agenda for Peace*, un.org ARES/51/242 (1997), adopts all texts on the Agenda For Peace.

²⁰¹ Security Council Resolution 1160 (1998), undocs.org, S/RES/1160, Violence erupted and escalated during 1997 and 1998 between the FRY and the KLA, which desired secession from the FRY following the breakup of the Yugoslavia at the end of the Cold War. The KLA was included in the US’s terrorist list and was removed in 1998 when diplomatic relations between the KLA and the US eased and improved. The tension between the KLA and the FRY was mainly a result of ethnic clashes between the dominating Serbian community and the Kosovar Albanians after the breakup of Yugoslavia and Slobodan Milosevic’s rise to power, for factual background see Independent International Commission on Kosovo. (2000). *The Kosovo Report*, Retrieved from *reliefweb.int*, and Christopher Greenwood. (2002). Humanitarian Intervention: The Case of Kosovo, *Finnish Yearbook of International Law*, pp. 141-175.

Security Council passed Resolution 1199 (1998) describing the situation as a 'threat to international peace and security'. The Council further demanded a cessation of hostilities, a ceasefire, an improvement of the humanitarian situation and that both parties enter immediately into negotiations. If no progress were to be made, the Security Council would consider further action.²⁰² Following the resolution, NATO stated that if FRY does not comply with the Resolutions, it was prepared for airstrikes against Yugoslavia. In addition, two agreements were set up between the OSCE (Organization for Security and Cooperation in Europe) and FRY, NATO and FRY. The former included the establishment of a Kosovo Verification Mission (KVM) in order to observe compliance and the latter a NATO aerial surveillance mission.²⁰³ Resolution 1203 adopted in October 1998 endorsed these missions and demanded prompt implementation.²⁰⁴ The six-nation Contact Group (UK, US, France, Germany, Russia and Italy, established at the 1992 London Conference on the Former Yugoslavia) agreed to continue the efforts for the creation of a peaceful solution to the conflict and to convene urgent negotiations. Nonetheless, the Serbian delegation failed to sign the proposed peace agreement and the efforts failed to prevent a stalemate.²⁰⁵ The Serbian forces intensified their offensive against the KLA and the OSCE mission withdrew from the region, following attacks on 20 March. Four days later the NATO air campaign (Operation Allied Force) commenced and lasted until 10 June 1999.

On 24 March, at the Security Council meeting, the United Kingdom justified the commencement of the air campaign "as an exceptional measure to prevent an overwhelming humanitarian catastrophe."²⁰⁶ Other NATO states, such as the US, Canada and the Netherlands, also relied upon humanitarian justifications.²⁰⁷ On 26 March 1999, the Security Council voted against the Russian demand to end the

²⁰² UNSCR 1199 (1998), undocs.org, S/RES/1199.

²⁰³ See *NATO's role in relation to the conflict on Kosovo*, NATO's official homepage, Retrieved from nato.int/Kosovo, updated version 15 July 1999.

²⁰⁴ UNSCR1203, 1998, undocs.org, S/RES/1203.

²⁰⁵ United Nations Archives, FONDS International Conference on the Former Yugoslavia (ICFY), (1192-1993), AG-065.

²⁰⁶ Greenwood, *op cit.*, p. 158.

²⁰⁷ *Ibid.*, p. 159.

use of force against Yugoslavia.²⁰⁸ In June 1999, the Security Council passed Resolution 1244 (1999) under Chapter VII and included among other decisions: an endorsement of the agreement of the G-8 Foreign Ministers on 6 May 1999 to end the conflict, provided for the deployment of international security presence under the auspices of the United Nations with substantial NATO participation and decided that an agreement should be reached for the establishment of an interim administration for Kosovo under which the people of Kosovo shall enjoy substantial autonomy. This would provide “transitional administration”, while “establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo.”²⁰⁹ In effect, these were the provisions for the temporary territorial administration of Kosovo until recognition of its independence.

The Resolution did not include any condemnation for the NATO bombing campaign but reaffirmed the commitment of all Member States to the sovereignty and territorial integrity of the FRY and of states of the region; as if the NATO campaign never occurred. China abstained from the vote and asserted that NATO seriously breached Charter principles, undermined the authority of the Security Council and hence, established a very dangerous precedent. A similar view was expressed by Costa Rica, Brazil and Mexico.²¹⁰

The Legal Debate on Kosovo

According to Christopher Greenwood, the NATO’s resort to force was a legitimate action “recognized by international law” and “consistent with Security Council resolutions”.²¹¹ For Greenwood: “Kosovo was not a case in which the Security Council was passive and NATO acted entirely on its own initiative.”²¹² NATO acted in opposition to “the objectives of the international community”, yet only to “further” them.²¹³ The non-intervention prohibition, respect for state

²⁰⁸ Security Council Press Release, SC/6659, 26 March 1999.

²⁰⁹ UNSCR 1244, 1999, undocs.org, S/RES/1999, 10 June.

²¹⁰ Gray, 2008, *op cit.*, p. 43, Greenwood, *op cit.*, p. 152 and 155.

²¹¹ Greenwood, *op cit.*, p. 174.

²¹² *Ibid.*

²¹³ *Ibid.*

sovereignty and the values of human rights, upon which the international legal system is founded, Greenwood argues, are of equal importance.²¹⁴

Bruno Simma asserted that there was only a “thin red line” between legality and illegality.²¹⁵ The intervention was morally legitimate, but the Kosovo campaign should remain an exception. Reflecting on the ‘synergy’ between NATO and the UN, Simma argued, NATO implemented the policy “formulated by the international community/United Nations... filling the gaps of the Charter... in a way that is consistent, in substance, with the purposes of the United Nations.”²¹⁶ Antonio Cassese also claimed that NATO’s official declarations demonstrated the humanitarian and “exceptional” character of the intervention.²¹⁷ However, since the proper application of human rights had been increasingly understood as an *erga omnes* obligation, in opposition to Simma, the campaign could not have been considered as an exception of the Charter anymore.²¹⁸ From this perspective, both Greenwood and Cassese argued that *the moral imperative for action* in the face of gross human rights violations was such to legitimate the intervention. Thomas Franck also suggested that there is a need to find “ways out of the conundrum” (i.e. legality/legitimacy).²¹⁹ For Franck, the situation reflected the “excessive chasm between law and the common moral sense”.²²⁰ The view supported by Thomas Franck, Cassese and Greenwood was that the campaign was morally right but unlawful. However, paradoxically, even if the act was illegal, the NATO campaign “produced a result more in keeping with the intent of the law... - and more moral - than would have ensued had not action been taken to prevent another Balkan genocide.”²²¹ From this point of view, Kosovo represents

²¹⁴ *Ibid.*, p. 161.

²¹⁵ Bruno Simma. (1999). NATO, the UN, and the Use of Force, *European Journal of International Law*, Vol. 10, pp.1-22, p. 6 and 22.

²¹⁶ *Ibid.*, p. 12, Simma worked as a jurist in the International Court of Justice from 2003 until 2012.

²¹⁷ Antonio Cassese. (1999). *Ex iniuria ius oritur*: are we moving towards international legitimization of forcible humanitarian countermeasures in the world community?, *European Journal of International Law*, Vol. 10, Issue 1, pp. 23-30, p. 23.

²¹⁸ *Ibid.*, p. 24-25.

²¹⁹ Franck, 2003, *op cit.*, p. 212.

²²⁰ *Ibid.*, p. 214

²²¹ *Ibid.*, p. 221, see also Michael J. Glennon. (1999). The New Interventionists: The Search for a Just International Law, *Foreign Affairs*, May/June Issue.

the western consensus on the use of force for human protection purposes and the initiative to change the law on the use of force according to that consensus.

Critical of such a perspective, Michael Byers and Simon Chesterman stated: “the views of the international society of states are, in our opinion, a much more important factor in the development and change of international law than many Anglo-American authors believe them to be.”²²² Indeed, many states underlined the illegality of the NATO campaign.²²³ The NATO campaign was not only controversial among international lawyers in relation to its legality/illegality. While for some, the NATO campaign “was effective in stopping the slaughter”,²²⁴ for others, “the NATO action did not stop the commission of widespread grave violations of international criminal law.”²²⁵ According to Charney:

“the military campaign itself was not tailored to protect Albanians in Kosovo, but, rather, had the broader objective of undermining the FRY Government to force its capitulations, together with the collateral objective of freeing some or all of Kosovo from FRY control by partition or independence.”²²⁶

In response to the NATO campaign, Yugoslavia brought a case before the International Court of Justice against the ten NATO members participating in the operation, claiming that the campaign was in breach of international law. Yugoslavia argued the bombing was not proportionate, was an intervention in its internal affairs (coalition forces trained and military equipped the KLA) and was a violation of the Genocide Convention under which it is illegal to impose life-threatening conditions to a particular national group.²²⁷ In its letter to the Court

²²² Michael Byers and Simon Chesterman, Changing the rules about rules? Unilateral humanitarian intervention and the future of international law in (eds.) Holzgrefe and Keohane, *op cit.*, p. 196

²²³ See Thomas Franck, Interpretation and change in the law of humanitarian intervention, in (eds.) Holzgrefe and Keohane, *op cit.*, p. 215, the Ministers of Foreign Affairs of the Group of 77 “rejected the so-called right of humanitarian intervention” saying that it “had no basis in the UN Charter or in international law.”

²²⁴ Greenwood, *op cit.*, pp. 143 to 144.

²²⁵ Jonathan I. Charney. (1999). Anticipatory Humanitarian Intervention in Kosovo, *American Journal of International Law*, Vol. 93, No. 4, pp. 834-841, p. 840, see also David Rieff. (2002). On the Wishful Thinking of eminent persons: the Independent Commission’s Kosovo Report, *Journal of Human Rights*, Vol. 1, No. 1, pp. 11-119.

²²⁶ *Ibid.*, p. 840.

²²⁷ Legality of Use of Force (Yugoslavia v. United State et al.), Written Proceedings, Request for the indication of Provisional Measures, Retrieved from icj-cij.org.

requested, an indication of provisional measures, and in explaining its reasons, it wrote that, “enormous damage has been caused to schools, hospitals, radio and television stations, institutions and cultural monuments, as well as to places of worship.”²²⁸ The Court rejected the application of the FRY on grounds of jurisdiction, pursuant to a reservation of the US to Article XI of the Genocide Convention, which declares that a US “specific consent” is needed before any dispute is submitted to the ICJ.²²⁹

The Kosovo intervention exposes the internal conflict and paradox in international law between human rights and state sovereignty - the rights of states and the rights of individuals. It also demonstrates that for most international lawyers, even if unlawful, humanitarian intervention that fulfils certain criteria, such as ‘proportionality’, is to be preferred over, allegedly, no action at all.²³⁰ Christine Chinkin’s remarks, on the aftermath of the NATO campaign, summarize the controversy and anxiety among international lawyers on the use of force for humanitarian purposes at the end of the twentieth century:

“I have found it challenging as an international lawyer and as a person to formulate my response to the Kosovo intervention. I have found the debates and media coverage sobering, especially seeing what we discuss and what we exclude, and the language we use for discussion. The many contradictions have made it problematic whether, in the words of the British Press, the substance, processes and institutions of international law had a “good” or a “bad” war: what are the implications of these events for international human rights, the emerging exercise of international criminal jurisdiction, and the role of international institutions and legal argument? Can any of these questions be separated from those of geopolitics, military strategy and economic interests?”²³¹

Looking back at the Kosovo operation today, from the moral justifications given to its ‘collective’ component and the tacit acceptance of the operation by at least the majority of states of the Security Council (in contrast to Russia and China), Kosovo was the first of a new wave of ‘humanitarian interventions’. Nonetheless, the investigation in this chapter so far has demonstrated that Kosovo was not a

²²⁸ *Ibid.*

²²⁹ see also the *Hague Justice Portal*, <http://www.haguejusticeportal.net/index.php?id=6211>.

²³⁰ see the ‘Editorial Comments: NATO’s Kosovo Intervention’ in the *American Journal of International Law*, Vol. 93, No.4, articles by Henkin, Wedgood, Charney, Chinkin, Falk, Franck and Reisman.

²³¹ Christine Chinkin. (1999). Kosovo: A “Good” or “Bad” War?, *American Journal of International Law*, Vol. 93, No. 4, pp. 841-847, p. 842.

blunt and unexpected breach of international law, nor does it represent a novel management of conflict. The Kosovo operation should be seen as: (1.) the culmination of the transformations of peacekeeping operations, (2.) the culmination of interventions of the 1990s (peace-enforcements) and the body of practice for the management of conflicts that emerged during the same period, (3.) the result of pro-humanitarian activists, lawyers and the general discourse of the liberal peace movement that wished to institutionalize and naturalize the moral adherence to human rights, and (4.) the militarization of human protection practices and subsequent rationalization. Whether we agree or disagree with the Kosovo operation, Kosovo was the beginning of the intellectual and hands-on rationalization of military interventions for what will become *linguistically* the ‘responsible protection’ of human life.

f. The institutionalization of the Responsibility to Protect framework (1999-2011)

From Dual Promise to Dual Responsibility

Amidst rising tensions in East Timor (1999), in a controversial article to *The Economist*, former Secretary-General Kofi Annan pointed out, that neither Kosovo nor Rwanda are “satisfactory” as “precedents” for the new millennium.²³² Annan urged the broader international community to respond “consistently” and “holistically” to humanitarian crises. According to Annan:

“The choice must not be between council unity and inaction in the face of genocide – as in the case of Rwanda – and council division, but regional action, as in the case of Kosovo. In both cases the UN should have been able to find common ground in upholding the principles of the charter, and defending our common humanity.”²³³

Further he stated that, “the charter requires the council to be the defender of the ‘common interest’. Unless it is seen to be so – in an era of human rights, interdependence and globalization – there is a danger that others will seek to take its place.”²³⁴ NATO, allegedly, is the most strategically and militarily fit body

²³² Annan, 1999, *op cit*.

²³³ *Ibid.*, p. 3.

²³⁴ *Ibid.*

to execute such an intervention. Annan stated that sovereignty is not only about states protecting their integrity and independence from outside intervention and insurgents, but it is rather about serving the people and individuals under its authority.²³⁵ These are the two faces, or as Annan conceived it, the “two concepts of sovereignty.”²³⁶ Furthermore, he added: “When we read the charter *today*, we are more than ever conscious that its aim is *to protect individual human beings, not to protect those who abuse them.*”²³⁷ Yet, the Charter is the same piece of document today as in 1945. Annan does not make clear why ‘we’ are able to understand the aims of the Charter today but could not in 1945. In other words, how is it that human rights are more important than state sovereignty today than in 1945? The investigation on the international right to protect human life so far has shown that the changed attitude to the Charter prohibitions and the right to intervene was, rather, a gradual institutional, executive and intellectual development.

Annan’s article was presented at the General Assembly. His remarks and emphasis given to the dilemma of action or inaction exposes the following, now commonplace, conviction: some action is better than no action at all. Significantly “inaction” here may very well suggest, as Annan states, “doing too little, too late.”²³⁸ The appalling scenes of horror from Srebrenica and Rwanda generates an urgency to immediately intervene to stop or deter the brutality; it creates a sense of responsibility. Yet, where does this responsibility come from? Is always some action better than none? Or how is it productive to talk about action or inaction in abstraction and without the merits of a specific context? Why is it that the answer to the many complications of humanitarian intervention is more or less action and not *what* kind of action/inaction?

²³⁵ *Ibid.*, p. 2.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

It was after Annan's repeated pleas that the Canadian government formed the ICISS.²³⁹ Significantly, the report was published three months after the 9/11 attacks in New York. However, in the Foreword of the report, Gareth Evans said it was largely completed before the appalling attacks. The Commissioners were brought together to forge a new consensus or a common ground on how to approach these issues. In the aftermath of Kosovo, Canada announced at the General Assembly the creation of an ad hoc committee to review the circumstances that give rise to 'humanitarian intervention.' The ICISS was comprised of 12 professionals, including lawyers, politicians, diplomats, academics and a former General.²⁴⁰ It was Co-Chaired by Gareth Evans an Australian politician, academic and president of the Brussels-based International Crisis Group and Mohammed Sahnoun, the UN diplomat and politician who was Special Representative of the Secretary-General in Somalia in 1992. The Commission was asked to deliver a policy report "that would help the Secretary-General and everyone else find some new common ground."²⁴¹

The Responsibility to Protect (R2P) recognizes that genocide, war crimes, ethnic cleansing and crimes against humanity are not to be considered only as internal but international, the state has an obligation to uphold basic human rights. The conduct of the state towards its entire people becomes a criterion for its legitimacy. The state is no longer completely free to its domestic affairs; its sovereignty becomes conditional. According to the ICISS, sovereignty nurses a "dual responsibility": an external one "to respect the sovereignty of other states" and an internal one "to respect the dignity and basic rights of all the people within the state."²⁴² While the Commission provided in the report an exegesis of its redefinition of sovereignty, it also reaffirmed that the principles of non-

²³⁹ We the Peoples: the role of the United Nations in the twenty-first century, Report of the Secretary General, undocs.org A/54/2000.

²⁴⁰ ICISS, *op cit*, comprised of Gareth Evans, Mohammed Sahnoun, Gisèle Coté-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Cyril Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein, Ramesh Thakur, see also the *Supplementary Volume* to the Report which includes research, bibliography and analyses on humanitarian intervention, Retrieved from idrc.ca.

²⁴¹ *Ibid.* Foreword.

²⁴² *Ibid.*, p. 8.

intervention and the rules of the prohibition not to use force are “organising principles of the UN System.”²⁴³

The antecedent of the responsibility to protect concept is considered to be the ‘*sovereignty as responsibility*’ concept, first formulated in the work of Francis M. Deng and his colleagues of the Brookings Institution, who focused on conflict management in Africa.²⁴⁴ Their work emphasised on internally displaced persons (IDPs). According to Deng and his colleagues, a responsible and ‘legitimate’ state, must “demonstrate responsibility, which means at the very least ensuring a certain level of protection for and providing the basic needs of the people.”²⁴⁵ This is the idea behind the responsibility to protect concept, “from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties.”²⁴⁶

Mass atrocity crimes and gross human right violations are defined more precisely as genocide, war crimes and crimes against humanity.²⁴⁷ The question then posed to the ICISS was, how are these ‘shock-emitting crimes’ to be dealt with? The concept of ‘sovereignty as responsibility’ within R2P, entails that when a state is unable or unwilling to protect its population its sovereignty is “taken up” by the international community.²⁴⁸ The responsibility to protect concept seeks to provide, under certain criteria, a legal authorisation for other states to intervene collectively using military force to protect populations at risk.²⁴⁹ These criteria are separated into (1.) The Just Cause Threshold, (2.) The Precautionary Principles, (3.) Right authority’ and (4.) Operational Principles. As I will discuss in the next chapter, this framework/criteria builds upon the juridical and moral claims of the Just War tradition and contemporary just war reasoning. This is

²⁴³ *Ibid.*, p. 13.

²⁴⁴ Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I. William Zartman. (1996). *Sovereignty as Responsibility: Conflict Management in Africa*, The Brookings Institution, Washington D.C.

²⁴⁵ ICISS, *op cit.*, p. 28.

²⁴⁶ *Ibid.*, p. 13.

²⁴⁷ Gareth Evans. (2008). *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Brookings Institution Press, Washington D. C., p. 12.

²⁴⁸ *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, undocs.org A/59/565 (2004), par. 29.

²⁴⁹ ICISS., *op cit.* p 33.

broadly the second pillar of R2P, ‘the responsibility to react’. The concept is not limited to military intervention, it is a ‘*three pillar*’ strategy, including a *responsibility to ‘prevent’, ‘react’ and ‘rebuild’*; it is the responsibility to react using military force that produced the most forceful debates between academic, diplomatic and executive circles, but the other two are equally important. When academics and diplomats refer broadly to ‘R2P’ they, more often than not, refer to ‘the responsibility to react’ and the above four central ‘criteria’.

To Prevent

The ICISS report and Gareth Evans, academic and member of the ICISS, suggest that prevention is one of the central tenets of the responsibility to protect: “prevention is the single most important dimension of the responsibility to protect.”²⁵⁰ The responsibility to *prevent* establishes both long-term and short-term measures, depending on the necessities of each case, when the state is ‘unwilling or unable’ to fulfil its obligations. According to Evans, over the years, a ‘prevention toolbox’ has been developing to respond to such crises.²⁵¹ Imagine two “trays”, two main objectives, “structural prevention measures” (which tend to be long-term measures) and “direct operational measures” (short-term). Now each of these trays has four “sub-compartments”: (1.) political and diplomatic, (2.) legal and constitutional, (3.) economic and social and (4.) security sector measures. For example, a direct political measure would be the threat of political sanctions, while an economic structural long-term measure, would be the encouragement of larger economic integration policies.²⁵² The responsibility of the ‘international community’ to prevent begins only after the actual humanitarian catastrophe has arisen, since in order to consider a case as ‘exceptional’ there must be ‘actual or apprehended’ large scale loss of life and the state must be ‘unwilling or unable’ to help itself; the initial question is if these measures are actually preventive. Nonetheless, what can also be observed is that

²⁵⁰ *Ibid.*, p. xi.

²⁵¹ Evans, *op cit.*, p. 86.

²⁵² Evans, *op cit.*, pp. 86 to 119.

R2P imagines a wider managerial and institutional approach to international crises.

To React

The responsibility to *react* entails coercive measures, such as extensive economic sanctions, and if appropriate, military intervention. So when is it 'right' to intervene? In effect this is R2P's main criteria referred to above.²⁵³ The 'Just Cause Threshold' provides for 'military intervention' if 'serious and irreparable harm' occurs of:

(a.) large scale loss of life: actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect, or inability to act, or a failed state situation, and

(b.) large scale ethnic cleansing: actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

The 'Precautionary Principles' are: (a.) right intention, (b.) last resort, (c.) proportional means, and (d.) reasonable prospects (i.e. reasonable chance of success). However, this is to be done after the Security Council has determined a 'threat to international peace and security', and by acting under Chapter VII authorising states to use all necessary means if the state is unwilling or unable to cooperate.²⁵⁴ This is broadly what the criterion of 'Right Authority' provides.

The criterion 'Operational Principles' is a mix of general objectives such as 'clear and unambiguous mandate at all times', 'acceptance of limitations', 'protection of population, not defeat of state', 'rules of engagement which fit the concept and involve total adherence to international humanitarian law' and so on.²⁵⁵ In case the Security Council turns out to be deadlocked by the veto powers of its members, and fails or rejects a proposal for intervention, there are two alternative options: (a.) consideration of the matter by the General Assembly in

²⁵³ ICISS, *op cit*, p. 33.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid, op cit*, p. xii.

an Emergency Special Session under the ‘Uniting for Peace’ procedure or, (b.) action within the area of jurisdiction by regional or sub-regional organizations under Chapter VII of the Charter, subject to their seeking subsequent authorization from the Security Council.²⁵⁶

It can be argued that an intervention for protection purposes will often be contributing to some sort of regime change, whether that is to implicitly support a case of self-determination based on ethnic identities, such as Kosovo, or of a ‘democratic movement’, as it happened recently in Libya and contributed to a complete regime change with the fall of Qaddafi. The effects and ‘meanings’ of such interventions are concerns that I hope to answer.

To Rebuild

The responsibility to *rebuild* is the last pillar of R2P and one could argue the most neglected and obscure of all three. According to the Report the transfer of authority should be made as soon as possible (i.e. transition to a newly formed government). Here the Commissioners envisage a transition to UN command in liaison with *de facto* civilian authority. Those authorities are to be elected, or a ‘National Council’ under the auspices of the UN is to be devised. The Report stresses that there should be “genuine commitment to helping build durable peace”, promoting “good governance and sustainable development.”²⁵⁷ The objective is to create “political processes which require local actors to take over responsibility both for rebuilding their society and for creating patterns of cooperation between antagonistic groups.”²⁵⁸ What appears here is a process of “dissolution” of international responsibility; responsibility is transferred back to local authorities.²⁵⁹

Nonetheless, as past case experience has shown, the transferring of authority or the selection between competing claimants to authority presents a lot of difficulties, especially if both competing parties have been accused of mass

²⁵⁶ *Ibid.*, p. xiii

²⁵⁷ *Ibid.*, p. 39.

²⁵⁸ *Ibid.*, p. 45.

²⁵⁹ *Ibid.*

human rights violations.²⁶⁰ Considering the possibility of such operations to be increasingly carried out from the air, to secure ‘no-fly zones’ and not to put ‘boots on the ground’, as Security Council Resolution 1973 (2011) for Libya provided, the interveners are seen to be presented with two options, either assist anti-government ground forces or contract special forces employed by private military companies.²⁶¹ Either way they will have to support a claimant to authority. R2P leaves open these fundamental aspects. In addition, the post-intervention phase often entails an influx of previously frozen accounts or money in the form of aid, transferred back to the newly established authorities. Under what conditions should these decisions be made and by who?

Subsequent Developments

The 2004 Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change, articulated the priorities of the ‘international community’ and attempted to examine the *challenges* the world faces concerning peace and security. This can be seen as the identification of structural problems or systemic conditions. Significantly, the Panel endorsed the R2P report by the ICISS.²⁶² The sixteen-member panel was comprised of former Secretary-Generals, politicians and professionals. The panel emphasized that globalization has transformed the traditional boundaries of states. For example, it suggested that a major terrorist attacks anywhere in the industrialized world would have devastating consequences for the wellbeing of millions in the developing world.²⁶³ It identified six clusters of threats: (1.) war between states, (2) violence within states including civil wars, large-scale human rights abuses and genocide, (3.) poverty, infectious diseases and environmental degradation, (4.) nuclear, radiological, chemical and biological weapons (5.) terrorism (6.) transnational

²⁶⁰ See Congo (1964), Haiti (1994).

²⁶¹ Richard Norton-Taylor. (2011, 23 August). *SAS Troopers Help Coordinate Rebels*, *The Guardian*, Retrieved from theguardian.com.

²⁶² *A More Secure World*, *op cit.*, p. 85.

²⁶³ *Ibid.*, p. 19, It was estimated by the World Bank that the attack of September 11 2001 increased the number of people living in poverty by 10 million; the total cost to the world economy ‘probably exceeded 80 billion dollars’.

organized crime.²⁶⁴ The report highlighted the Millennium Declaration (2000) and the Human Development Report (1994), underlining that development is the “indispensable foundation of a new collective security system.”²⁶⁵ The ‘primary responsibility’ of the governments in organizing development is “a conducive environment for vigorous private-sector-led growth and aid effectiveness.”²⁶⁶ Furthermore, the report called for a “credible collective security system” under a “shared responsibility” and urged the UN to work with national authorities, international financial institutions, civil society organizations, and the private sector “to develop norms governing the management of resources for countries emerging from or are at risk of conflict”.²⁶⁷

At the 2005 World Summit, the representatives of states agreed to adopt the responsibility to protect concept.²⁶⁸ However, they did not adopt the whole document as such. Particularly, they did not endorse the ‘Just Cause threshold’ criteria. It was rather a limited adoption, or as others who wanted to see a more robust approach to R2P pointed out, the reform documents as incorporated in the World Summit Outcome Document (SDO) have been “emasculated”.²⁶⁹ Nonetheless, in paragraphs 138 and 139 of the SDO the broader community of states embraced the notion that the ‘international community’ “should, as appropriate, encourage and help States to exercise this responsibility”, and further “the international community ... has the responsibility to use appropriate, humanitarian and other peaceful means, in accordance with Chapters VI and VII”.²⁷⁰ Of course, this is a ‘lighter’ version.

Since 2005, eight regional and international organizations have founded the International Coalition for the Responsibility to Protect (ICRtoP). The purpose of the coalition is mainly to encourage the promotion of the Responsibility to

²⁶⁴ *Ibid.*, p. 2.

²⁶⁵ *Ibid.*, p. 19.

²⁶⁶ *Ibid.*, p. 28.

²⁶⁷ *Ibid.*, p. 35.

²⁶⁸ World Summit Outcome 2005, undocs.org A/RES/60/1, 16 September.

²⁶⁹ Peter Hilpold. (2006). The Duty to Protect and the Reform of the United Nations, *Max Planck Yearbook of United Nations Law*, Vol. 10, pp. 35-69, p. 38.

²⁷⁰ World Summit Outcome 2005, *op cit.*, p. 30.

Protect as a *norm* and press international actors to ‘strengthen capacities’ for its implementation.²⁷¹ There was also, in 2008, the creation of the Centre for the Responsibility to Protect to “catalyse action”.²⁷² In addition to all these developments has been Secretary-General Ban Ki-Moon’s report in 2009. Ki-Moon urged the international community to “implement” the decisions of the 2005 World Summit “in a fully faithful and consistent manner” and not to “reinterpret or renegotiate the conclusions.”²⁷³ As discussed, the ICISS does include a redefinition of sovereignty in relation to the use of force, however Ki-Moon stated that “the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity of the Charter.”²⁷⁴ The Secretary-General posed that part of the problem was conceptual, humanitarian intervention presented a “false choice between two extremes”; hence, the responsibility to protect is a “commitment” of the international community with the “cooperation among Member States’, ‘regional and sub-regional organizations”, “civil society and the private sector’ and ‘the institutional strengths ... of the United Nations.”²⁷⁵

The ‘Concept note’ of the Office of the President of the General Assembly which was presented together with the abovementioned Report of the Secretary General admits that the Outcome Document of the World Summit is “very cautious when it comes to responsibility to take action... they are prepared to do this ‘on a case by case basis’, which precludes a systematic responsibility.”²⁷⁶ According to the Concept note, none of the five documents articulating the responsibility to protect are sources of binding international law in terms of Article 38 of the

²⁷¹ International Coalition for the Responsibility to Protect, responsibilitytoprotect.org.

²⁷² Global Centre of the Responsibility to Protect, globalr2p.org.

²⁷³ *Implementing the Responsibility to Protect*, Report of the Secretary General, [undocs.org A/63/677](http://undocs.org/A/63/677) (2009), p. 4, see also *In Larger Freedom: towards development, security and human rights for all*, Report of the Secretary General, [undocs.org A/79/2005](http://undocs.org/A/79/2005), 21 March, *Implementing the Responsibility to Protect: Accountability for Prevention*, Report of the Secretary General A/71/1016 – S/2017/556 (2017), 10 August.

²⁷⁴ *Ibid.*, p. 4.

²⁷⁵ *Ibid.*

²⁷⁶ *Concept note on responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity*, Office of the President of the General Assembly, 17 July 2009.

Statute of the ICJ, which lists the classic sources of international law.²⁷⁷ Concerning the reaction phase of the responsibility to protect concept, the Concept note stressed that its elements “are far more problematic” than those of prevention.²⁷⁸ All the issues concerning the actual decision to use force were emphasized: the veto powers of the Security Council, the inability of the General Assembly to change a Security Council decision once votes have been casted, the unwillingness of the Security Council to transfer its powers in determining an act of aggression to the International Criminal Court (ICC) and that under the Charter the Security Council has authority only to determine and act against a threat to peace and security and *not to violations of international legal obligations or human rights and humanitarian law*. These needed to be “seriously reconsidered” if the adoption of the responsibility to protect is to become at least workable.²⁷⁹ With regards to the re-conceptualisation of sovereignty, which is the bedrock of R2P, the Concept note identified that it is a “contradiction” to the unequal authority evident in the veto powers of the P-5. According to the President of the GA, “the erosion of globalization strengthens the Westphalia paradigm as against the individual rights centred paradigm of responsibility to protect.”²⁸⁰ The Concept note represents the controversy of the subsequent debate in the General Assembly, where all members agreed with paras. 138 and 139 of the Outcome Document and the need for debate on how to implement the responsibility to protect, but many also posed fears as to how R2P can also fail.²⁸¹

Considering the above points, there were instantly two aspects that the Commissioners could not deal with: firstly the composition of the Security Council itself and its special discretionary powers and, secondly, that a re-conceptualization of sovereignty was going to be challenged by a considerable

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*, p. 3.

²⁸¹ Debate at the General Assembly, Follow up to the outcome of the Millennium Summit, 2009, Retrieved from responsibilitytoprotect.org.

number of states.²⁸² For example, the Representative of Sudan stated: “To give the Security Council the privilege of being an executor of the concept of the responsibility to protect would be tantamount to giving a wolf the responsibility to adopt a lamb.”²⁸³ A common question posed by representatives of states was: Can a decision ever be reached to intervene in the domestic affairs of China, Russia or the US? According to Gareth Evans: “And there will be some countries for whom such measures will never be a practical option – a fact of life with which we simply have to live in many different international contexts.”²⁸⁴

Today, the responsibility to protect concept is arguably the dominant medium of inquiry with which international actors and organizations assess their response to mass atrocities and mass human rights violations and the dominant juridico-moral framework used to justify intervention for human protection purposes. Officials and diplomats do not speak about a ‘right of humanitarian intervention’ anymore but of a ‘responsibility to protect’. In Security Council Resolution 1674 (2006), the Council reaffirmed what the SDO endorsed “the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁸⁵ In 2007, R2P was used in Resolution 1769, which authorised the deployment of peacekeepers to the Darfur region of Sudan (UNAMID); and in 2011, the Security Council in Resolution 1973, used R2P for the first time to authorise member states to take all necessary measures, including military force, for the protection of civilians in the Libyan Arab Jamahiriya.²⁸⁶ A previous UNSCR 1970 (2011) referred the situation to the prosecutor of the ICC, imposed an arms embargo, asset freezes and travel bans to individuals linked to Qaddafi.²⁸⁷ As Carsten Stahn notes, “the situation in Libya marks the first precedent in which the ICC’s intervention was coupled with the invocation of the

²⁸² See Noam Chomsky. (2012). *A Generation Draws the Line: Humanitarian Intervention and the “Responsibility to Protect” Today*, Paradigm Publishers, see Foreword by Jean Bricmont, p. vi.

²⁸³ Statement on the General Assembly Debate on the Responsibility to Protect, 2009, Retrieved from responsibilitytoprotect.org, Sudan Statement.

²⁸⁴ Gareth Evans, 2008, *op cit*, p. 64.

²⁸⁵ UNSCR 1674 (2006), undocs.org, S/RES/1674

²⁸⁶ UNSCR 1769 (2007), undocs.org S/RES/1769, 31 July and UNSCR 1973 (2011), undocs.org S/RES/1973, 17 March.

²⁸⁷ UNSCR 1970 (2011), undocs.org S/RES/1970, 26 February.

responsibility to protect.”²⁸⁸ Coalition forces of the US, France, UK, Italy and Canada began enforcing the UN-authorized no-fly zone (Operation Odyssey Dawn) and carried air strikes on tanks and military facilities around Benghazi and Tripoli under Resolution 1973. On 31 March 2011, the operation was passed over to NATO and named Operation Unified Protector. The seven-month Operation ended on 31 October 2011 signalled by Qaddafi’s capture and subsequent killing, by anti-Qaddafi fighters on the ground (20 October 2011). It was this authority that was challenged yet tacitly accepted in Kosovo.

The long history of the twentieth century is also a history of exploitation and inequality, and the remnants of this history are deeply embedded in the everyday lives of those people in danger. Has, what we name the ‘international community’, become ready to take on such a responsibility and carry the promise? The intervention in Libya became a cause for celebration for pro-R2P advocates.²⁸⁹ For supporters of the concept, such as Catherine Powell, the use of the R2P in UNSCR 1973 (2011), showcases that international law has “travelled” a long way and that today the rights of individuals are not only the concern of individual states but of the ‘international community’.²⁹⁰ The use of the word ‘travelled’ by Powell, might also signify a vision that Powell ascribes to. For Powell, the Libyan case represents “a multilateral constitutional moment” in the history of international law, akin to that of 1945.²⁹¹ It paves the way, “along a timeline”²⁹², for the legal enforcement of a *collective* responsibility “to assist individual states for meeting their obligations... and to respond to serious threats to citizens when individual states are unwilling or unable.”²⁹³ Contrary to such forward-looking accounts, which see a normative shift (i.e. that international law has ‘travelled’), scholars such as James Turner Johnson see in R2P a ‘return’ to a presumption

²⁸⁸ Carsten Stahn. (2012). Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’, *Journal of International Criminal Justice*, Vol. 10, Issue 2, pp. 325-349.

²⁸⁹ Anne-Marie Slaughter. (2011). Why Libya Sceptics were proved badly wrong. *Financial Times*, August 24, Thomas G. Weiss. (2011). RtoP Alive and Well after Libya, *Ethics & International Affairs*, Vol. 25, Issue 3, pp. 287-292.

²⁹⁰ Catherine Powell. (2012). Libya: A Multilateral Constitutional Moment?, *American Journal of International Law*, Vol. 106, Issue 2, pp. 298-316, p. 298.

²⁹¹ *Ibid.*, p. 299.

²⁹² *Ibid.*, p. 303.

²⁹³ *Ibid.*, p. 301.

against injustice, and therefore, a ‘return’ to the use of just war theory, conceived as a theory of justice and ethics on the use of force.²⁹⁴ The next chapter, will explore the relationship between R2P and just war theory, as well as the relationship between responsibility for protection and responsibility for punishment.

Concluding remarks

This chapter located historically, and in reference to specific cases, the approach of the UN (and of the Security Council in particular), of international lawyers and of other international actors on the use of military force for the protection of human rights. It demonstrated that the assumption of military intervention in defence of human rights was considered both legitimate and necessary even from the early years of the Charter, however Cold War power dynamics did not allow for its internalization and institutionalization just yet. Intellectually, R2P is the result of the active ‘human security’ agenda and of the “moral internationalism” of major liberal international institutions and policies.²⁹⁵ More specifically, R2P’s protracted emergence can be viewed then, as the culmination of the processes of naturalization and rationalization of the militarization of human protection practices. The discretionary powers of the Security Council were fundamental to the furtherance of this dominant emerging discourse on mass human rights atrocities and the bureaucratization of its practices. As such, R2P must be viewed as part of a broader movement that connects the moral adherence to human rights to the notion and obsession of criminalizing and punishing the perpetrators of mass human rights atrocities under international law’s courts and to the ‘body of practice’ produced from within the UN. This model of ‘protection’ is evidently a technocratic one.

²⁹⁴ James Turner Johnson. (2006). The Just War Idea: The State of the Question, *Social Philosophy and Policy*, Vol. 23, Issue 1, pp. 167-195, p. 256.

²⁹⁵ See Anne Orford. (2013). Moral Internationalism and the Responsibility to Protect, *European Journal of International Law*, Vol. 24, Issue 1, pp. 83-108.

CHAPTER TWO

JUST WAR, RESPONSIBILITY TO PROTECT AND PUNISHMENT

Introductory Remarks

Chapter 1 narrated the story of the development of R2P, the literature used in this chapter is primarily concerned with just war thinking ²⁹⁶, its ethical underpinnings and how it relates to the responsibility to protect concept. Since the Just War tradition is a discussion on the ethics and bracketing of war that spans more than five centuries, the chapter concentrates on just war theory's major moral claims and themes at play. The chapter is not a historical account of the Just War tradition but concentrates on the broader ethico-political claims of just war thinking so that the conventional/mainstream wisdom which underpins current R2P frameworks is unravelled. It is an attempt to pinpoint how is it that the ethical framework of just war thinking has become adapted and reinvented in current frameworks of the responsibility to protect concept.

Broadly and popularly perceived, the Just War tradition aimed to protect the innocent from gross injustice and social evil and argued that the demands of charity, justice, love and human dignity be respected. It has been claimed that 'classical' just war thinking differs from contemporary just war reasoning.²⁹⁷ Classical just war theory regards the punishment of wrongdoing as a just cause of war. Protecting innocent aliens was justified through Christian love and vindictive justice and was also part and parcel of the broader right of punishing violations of the law of nature and of the law of nations. To understand this claim this chapter revisits the classical idea of just war through the eyes of James Turner Johnson. It highlights some of the transformational moments under which contemporary just war thinking emerged and considers/evaluates the kind

²⁹⁶ The term 'Just War tradition' (capital letters) hereinafter denotes the broader tradition, whilst the term 'just war' thinking, reasoning or theory denotes loosely the applied method and/or ethics (used differently by thinkers of the tradition) and distinctions emerging from the broader tradition.

²⁹⁷ James Turner Johnson. (2006). The Just War Idea: The State of the Question, *Social Philosophy and Policy*, Vol. 23, Issue 1, pp. 167-195, p. 169.

of moral and legal axioms/beliefs contemporary just war theory upholds. Specifically, contemporary just war thinking, which places emphasis on using/reading just war theory within the limits of international law and universal jurisdiction, tends to hide the punitive ethos of just war thinking under the rubric of protection, the authority of legal institutions and laws of war, and the primacy of human rights. As a result, the punitive ethos of just war thinking and its relationship with the moral claim of protection and of humanitarianism has been under discussed. As this chapter argues, punitive practice seems to be a deeply rooted element of just war thinking and of customary international law. However, the punitive element that we can locate in current frameworks of R2P has been largely unexplored. Therefore, this chapter provides an account of the paradoxically intimate relationship and regular alternation of protection and punishment in the moral/political claims and the theory and praxis of humanitarian intervention. In terms of the methodology of the thesis this chapter is the second 'layer' that builds upon the story of the institutionalization of R2P, as developed in chapter 1, and along with chapter 1, becomes the basis for the critical assessment of the ethical claims and internal logic of the theory and practice of current mainstream responses to mass atrocities.

The chapter argues that the motive of punishment from 1945 onwards was institutionalized and therefore, it was also normalized and rationalized. Recognizing and realizing the punitive element of protection facilitates the theorizing of the legal, ethical and political limits of both protection and punishment.²⁹⁸ The recognition of the punitive ethos of the responsibility to protect concept presupposes that critical accounts, which highlight the foundational violence of international law, its inclusions and exclusions, its instances of exploitation, must be part of any ethical framework of a 'responsibility to protect' in international law. As such, critical approaches to just war theory, human rights and international law are used to illustrate the limitations of just war thinking within R2P. Looking at the reinvention of just war thinking and its contemporary use within R2P, points to where our thinking and

²⁹⁸ Orford, 2011, *op cit.*, 137.

theorizing of global ethical responsibility begins, and perhaps ends, regarding humanitarian intervention and protecting the Other.

a. De-moralization/Re-moralization and the absence of the concept of punishment

Following the end of WWII, rationales of war as punishment had largely been banished because of the emergence of the laws of war codified in the UN Charter, the Geneva Conventions and the Nuremberg Principles, as well as because of the emergence of the broader idea of state responsibility. In other words, the normalization and rationalization of the international criminalization of social and political violence had also overshadowed the ethics of criminalization per se. The international criminalization of social and political violence, the primacy of the Security Council in determining a threat to international peace and the ban on the use of force except in self-defence, echoed the *de-moralization* of the international order. In reference to the reasons for going to war, the phenomenon of de-moralization implies that a 'just war' is a war of self-defence or justified only if the international authority in the form of the UNSC would legitimate it. However, as Alex Blane and Benedict Kingsbury suggest: "punishment, retaliation and vengeance all seem to feature in the contemporary practice of international relations"; "most episodes of inter-state violence that might look like punishment by major states are not described that way."²⁹⁹ Anthony F. Lang also noticed that the concept of punishment is "largely absent" from scholarly writing.³⁰⁰ Scholars do describe "things like coercive military strategies, sanctions and war crime tribunals" but they "do not describe these practices in punitive terms" because of certain assumptions these scholars make on what punishment actually means.³⁰¹ Nonetheless, the punitive dimension of protection is evident in both military and non-military practices: economic

²⁹⁹ Alex Blane and Benedict Kingsbury. (2010) Punishment and the Ius Post Bellum, in Benedict Kingsbury and Benjamin Strauman (eds.). *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, Oxford University Press, p. 242.

³⁰⁰ Anthony F. Lang, Jr. (2009a). *Punishment, Justice and International Relations: Ethics and Order after the Cold War*, Routledge:, p. 11.

³⁰¹ *Ibid.*, p. 4,

sanctions, humanitarian interventions, punitive counter-terrorism policy, punitive air strikes, detention policies, interrogation and torture. Punitive intervention can be defined broadly as “the use of force across borders by a state or a group of states aimed at inflicting harm on one or more agents that are responsible for violating the rules or norms governing international society.”³⁰²

As discussed in chapter 1, for human rights activists the end of the Cold War was heralded as a new era in which the protection of human rights was regarded as fundamental to international law and security. Complemented by the efforts of Kofi Annan, during his office as Secretary-General, human rights became the centrepiece of the UN’s security agenda. Following the humanitarian failure of Rwanda and NATO’s controversial campaign in Kosovo, the formation of the ICISS was a concerted need of the holders of legal authority to reinterpret the concept of sovereignty, in order to further institutionalise the moral adherence of human rights. According to Eric Hobsbawm, during the Cold War, liberal institutions held on to the “temporary moment of their emergence”, the post-1945 order at the dawn of the ‘Golden Age’ of social and economic transformations.³⁰³ Their “hinge” was historically the “bizarre alliance between liberal capitalism and communism in ‘self-defence’ against fascism.”³⁰⁴ The period of the ‘Crisis Decades’ (1970s – 1991) was a “crisis of all forms of organization” and of all universalisms which did not allow a particular form of governance to dominate.³⁰⁵ For Hobsbawm, the Crisis Decades “revealed that human collective institutions had lost control over the collective consequences of human action.”³⁰⁶ An intrinsic feature of the international political scene from the 1990s onwards was an excess of power. During the 1990s, the now ‘unencumbered’ international political and financial institutions were celebrated as finally ‘working’. From those distinctive but interconnected international institutions, those that can punish a transgression of the law in the name of

³⁰² *Ibid.* p. 60.

³⁰³ Eric Hobsbawm. (1995). *Age of Extremes: The Short Twentieth Century 1914-1991*, Abacus, UK, p. 6.

³⁰⁴ *Ibid.*, p. 9.

³⁰⁵ *Ibid.*, p. 11.

³⁰⁶ *Ibid.*, p. 565.

security and human rights are, at the same time, those who protect the subjects of law. According to Janie Leatherman, various disciplinary and punitive technologies emerged out of the Cold War: “this system of discipline and punishment ended with the fall of the Berlin Wall and the collapse of the Soviet Union.”³⁰⁷ Yet its end, perhaps, saw the creation of another one.³⁰⁸ At the end of the Cold War, the inviolability of the state was furthered challenged, as the monopoly of ‘just’ uses of military force was to be dominated by the US and its NATO allies. Today, military intervention for human protection purposes explicates a desire not to protect the state but populations. What should also be noted is the broader willingness to consider humanitarian military interventions as ‘forces of good’. For Lang, the current ‘illiberal’ order: “promotes human rights in specific contexts and by means of punitive practices but without being nested in a broader rule-governed or a constitutional order.”³⁰⁹ For Lang, this ‘illiberal order’, as opposed to a liberal one that would promote human rights and democracy within the context of a “constitutional order”, individual executive authorities exact punishments “rendering it closer to vengeance than true punishment” that is retributive or has a deterrent effect.³¹⁰ However, retribution has also been characterized as unjust when it is practiced through military means in response to wrongdoing. Retribution and vengeance share the same roots; “their root is not concern for future safety”, “but indignation over past wrongdoing.”³¹¹

Returning to the argument of this chapter, this transformation can be perceived further as an attempt to *re-moralize* the international order. Within this order, the primary conceptual problems are those of authority and agency. In this sense, re-moralization is perceived as the return to the language of justness and

³⁰⁷ Janie Leatherman (ed.). (2008). *Discipline and Punish in Global Politics: Illusions of Control*, Palgrave MacMillan, p.4, Leatherman’s volume includes case studies from various authors on regimes of torture and surveillance, women’s rights, border control, media, global capital and religion.

³⁰⁸ *Ibid*, see also Michael Dillon and Julian Reid. (2001). Global Liberal Governance: Biopolitics, Security and War, *Millennium Journal of International Studies*, Vol. 30, No. 1, pp. 41-66.

³⁰⁹ Lang, 2009a, *op cit.*, p. 9

³¹⁰ *Ibid*.

³¹¹ David Luban. (2011). War as Punishment, *Philosophy and Public Affairs*, Vol. 39, No. 4, pp. 299-330, p. 305.

morality - the reappearance of 'just causes'. Does this re-moralization of international order also suggest an implicit return to punishment in relation to the protection of human rights? Where do we locate punishment, if punishment is considered anachronistic, and is widely absent from the discourse around humanitarian intervention and R2P? In turn, what are the risks of banishing punishment from the theorizing of responsibility in international law? Humanitarian interventions and punitive interventions are commonly considered as distinct, one is to halt violations whilst the other is to inflict harm. However, both share the punitive ethos: both, that is, are intended to punish those guilty of the violation of given norms.³¹² Punishment for Lang, is not *a priori* a negative element,³¹³ it entails a reordering and a retributive function, (i.e. restoring a sense of balance by punishing wrongdoing, as well as serving a deterrent function).³¹⁴ The increase of punitive intervention results, for Lang, from the increasing deployment of military force by the United States, with an emphasis on the protection of human rights and 'ethical' foreign policy, the criminalization of war and the employment of more punitive responses to violations of war crimes.³¹⁵

The particular political structure/form of the UNSC, characterised by a consistent 'inconsistency' towards mass human rights atrocities, allows certain forms of military intervention to pass in silence.³¹⁶ In other instances, where politics result in 'consensus', it authorizes them. Yet what does 'consensus' mean under the present international societal structure? An example of punitive 'humanitarian' practice are the air-strikes against Syria on 7 April 2017. The remarkable ease in which Donald Trump ordered air strikes against the Shayrat airbase near Holmes, alleging that this was the location from which the Syrian forces launched a

³¹² Lang, *op cit.*, p. 61

³¹³ *Ibid.*, p. 25

³¹⁴ *Ibid.*, p. 11 and 12

³¹⁵ *Ibid.*, p. 67.

³¹⁶ Aidan Hehir. (2013) The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect, *International Security*, Vol. 38, No. 1, pp. 137-159, Hehir claims the cases of Southern Rhodesia and Haiti (1994) are similar to the cases of Libya, Haiti (2004) could perhaps join the list. The connection between these cases contradicts the 'new politics of protection' posed by Bellamy and Williams and more liberal internationalists such as Catherine Powell, see Alex J. Bellamy and Paul D. Williams. (2013). The New Politics of Protection? Cote d' Ivoire, Libya, and the Responsibility to Protect, *International Affairs*, Vol. 82, No. 7, p. 826.

chemical attack on the rebel-held town of Khan-Sheikhun which killed at least 80 people, illustrates that this new ‘era’ of working security institutions proclaimed in the 1990s was not a juridically equal one. In purely moralising rhetoric Trump said the chemical had “a big impact” on him: “A chemical attack that was so horrific in Syria against innocent people, including women, small children and even beautiful little babies.”³¹⁷ Such a retaliatory act with punitive connotations could arguably be regarded as an act of aggression if carried by a non-western state. Apart from a heated debate on the Security Council in which the UK gave full support to the US no other significant step was taken, such as a fact-finding mission before ordering such air-strikes and as a call to protection.³¹⁸

b. Just war and the responsibility to protect: reinventing Just War

The constant use of just war thinking and vocabulary has prompted John Kelsay to present just war thinking as a social practice.³¹⁹ From one point of view, Kelsay is correct, to distinguish the just war vocabulary from those of international law or ‘strategic doctrines’. However, R2P is arguably a legal concept and is not normatively alien to the Just War tradition. In fact, R2P is arranged in form, structure and logic as a just war theory.

A just war theory sets a framework for an ethical inquiry on the legitimacy of war. Just war theories are therefore theories of justice. They answer two fundamental questions, when to use violence and how to use violence. It is not an attempt to question the use of force per se, but rather to bracket war. A theory of war ethics based on just war theory wants to frame war by placing a set of threshold criteria which provide the rights *to war* (*jus ad bellum*) and the rights *in war* (*jus in bello*). Emphasis throughout the chapter will be given to the *jus ad bellum*, though it is important also to discuss *jus in bello*. The *jus post bellum* frames considerations of the justness of measures taken after a sustained end in military

³¹⁷ Luke Harding. (2017, April 7). ‘It had a big impact on me’ – the story behind Trump’s whirlwind missile response, *The Guardian*, Retrieved from theguardian.

³¹⁸ Security Council 7919th Meeting, SC/12783, 7 April 2017, undocs.org.

³¹⁹ John Kelsay. (2013). Just War Thinking as a Social Practice, Special section: Just War and its critics, *Ethics and International affairs*, Vol. 27, No. 1, pp. 67-86, p. 68.

operations. For the sake of brevity, *jus in bello* and *jus post bellum* will not be a matter of focused discussion. The argument, which foregrounds the responsibility to protect as just war theory is that the theoretical framework of just cause, proportionality and legitimate authority (now in the form of the UNSC) remain in place. The responsibility to protect concept wants to frame the right to humanitarian intervention, elaborate on its conduct and establish the intentions of post-intervention systems of governance. In this sense, the responsibility to protect and just war theories share a common denominator. Their intention is to articulate the conditions under which legitimate authority triggers the right to use violence.

The intellectual history of the Just War tradition encompasses an enormous literature of religious, historical, philosophical and sociological writing. In recent years such history emerges through the academic literature on the ethics of war oriented broadly in political philosophy and international relations theory. Yet, the significance of just war thinking is not confined to that literature alone. Cian O’ Driscoll poses that just war is in fact the interpretative and moral lens through which we perceive, analyse and debate questions regarding the use of force internationally.³²⁰ Being the predominant medium of inquiry, suggests that just war theory and its thinking were - and are - not only used by academics, historians and scholars. It is an ethical language, filled with distinctions, binaries, histories and world-views, also used by international political actors and the wider international society. It is typical to come across news articles, political and legal debates which are characterized by the language and thinking of the tradition. On the day the Chilcot report from the Iraq inquiry was officially published, Chilcot stated: “We have concluded that the UK chose to join the invasion of Iraq before the peaceful options for disarmament had been exhausted. Military action at the time was not a *last resort*.”³²¹ The principle of last resort, a criterion of just war reasoning, acquired its status in the professional legal

³²⁰ Cian O’Driscoll. (2008a). James Turner Johnson’s Just War idea: Commanding the Headwaters of Tradition, *Journal of International Political Theory*, Vol. 4, No. 2, 189 – 211, p. 189.

³²¹ The Iraq Inquiry. (2015). Retrieved from iraqinquiry.org.

vocabulary of armed force as a result of it being conventionalized through statesmen and international actors when they debate the ‘justness’ of the use of military force in international relations both in political and in legal terms. This adds to the significance of the Just War tradition in the history of ideas as a whole. However, according to Nicholas Onuf, reviving an ethical tradition risks being a disaster: “Reinventing a tradition is at best a patch-job, at worst a delusion.”³²² The tradition’s persistence and adaptability as an ethical framework for the use of force does not suggest that its system and framework of ethics should escape critique but the opposite.

Luke Glanville indicates that the responsibility to protect concept does not represent a radical departure from traditional notions of sovereignty.³²³ The mainstream claim, contra Glanville, rests on the assumption that sovereignty in its traditional form enjoys an unfettered right to non-interference in its domestic affairs. This statist approach of sovereignty has served as an argument against humanitarian intervention by oppressive and abusive regimes. Conversely, it has been used as a counter-argument by pro-interventionists against all non-interventionist positions, condemning them of protecting oppressive regimes. Glanville supports that sovereignty in the sixteenth and seventeenth centuries entailed both rights and responsibilities, which persisted to evolve through to the present day, thus articulating a constitutive and contingent notion of sovereignty.³²⁴ Glanville’s historical trajectory is valued but it is also a limited reading in relation to the concept of the responsibility to protect. If we rather substitute sovereignty with moral and political authority more broadly we are presented with a wider historical trajectory. Through this lens, the point of departure for a critique of the responsibility to protect is the Just War tradition, which predates the concept of state sovereignty.

³²² Nicholas Onuf. (2009). Conclusions: Elusive Distinctions, Epochal Changes, in Eric A. Heinze and Brent J. Steele (eds.), *Ethics, Authority, and War: Non-State Actors and the Just War Tradition*, Palgrave Macmillan US, pp. 239-252, p. 250.

³²³ Luke Glanville. (2013). *Sovereignty and the Responsibility to Protect: A New History*, University of Chicago Press.

³²⁴ *Ibid*, p. 35, Glanville traces the origins of non-arbitrary authority to Jean Bodin, rooted in religious authority, the prince was accountable to God. Later in Hobbes, the right of individuals to personal safety is an obligation of natural law at p. 42.

A very important element of just war theory is the notion of legitimate authority. Just war theories are conventionalized and used to the extent they correspond to the morality of the particular political and legal authority for which they become a mechanism. Under this understanding, in the present international order, the responsibility to protect ‘uses’ the concept of state sovereignty to establish a claim for protection that ultimately transcends the state. Military interventions are decided collectively and are normatively grounded in one international authority - the international community. In this sense, R2P wants to provide the conditions under which universal authority takes precedence over state authority. However, in another sense, the responsibility to protect includes two notions of political and legal authority. Paradoxically its legitimacy is achieved through state responsibility and is further enhanced through the rule of sovereign equality and state sovereignty.³²⁵ Therefore, the notion of responsibility in R2P is twofold. There is (a.), the responsibility *of the state* for ‘large scale loss of life’, and also includes (b.), the responsibility *of the international community* to protect whereas a state is ‘unable or unwilling’ to fulfil its responsibility. Nonetheless, the responsibility to protect concept is not presented as an attempt to provide a concept of international authority. It provides for international jurisdiction but not for international moral authority, since political authority always resides with the state. The question of political authority in the responsibility to protect concept is returned back to the state. This is one of the conclusions of the 2005 World Summit in which the limits of universal jurisdiction were discussed and the norm of equal state sovereignty was reiterated. However, the Summit also agreed to an extensive role of international criminal jurisdiction that includes the notion of punishing violations of international law.³²⁶ Further, the Summit endorsed the broad idea behind the responsibility to protect concept. As such, the responsibility to protect derives authority from a rather chaotic framework. It attempts to create a functional

³²⁵ I assume this is what in part Nicholas Rengger is referring to when he uses the term of a ‘teleocratic’ conception of politics, of international order and security, see Nicholas Rengger. (2013). *Just War and the International Order: The Uncivil Condition in World Politics*, Cambridge University Press.

³²⁶ Orford, 2011, *op cit.*, p. 184.

universal jurisdiction, with the right to use force to protect and punish, that is cut off from notions of international authority and specifically from notions of international moral authority. In this sense, it is also a normative framework that provides the possibility to be interpreted and understood as apolitical and amoral – a neutral framework under which decisions to use force can be considered. To this end, and to examine the effects of the concept, R2P is better seen in a negative fashion as “antipolitical” rather than as mere “political rhetoric”.³²⁷

So what kind of authority and what kind of ethics does the responsibility to protect concept represent? If the responsibility to protect concept provides for universal jurisdiction, can we have a working universal jurisdictional authority that is apolitical, non-ideological and amoral? Is not the regulation of the use of violence to halt mass human right atrocities already an ethical, moral and ideological stance? One of the arguments of the chapter is that the use of violence for human protection purposes *is* a political and moral claim.

As Ian Clark noted, it is impossible to trace just war theory to a single foundational doctrine, neither is it possible to establish its emergence from a single idea.³²⁸ The literature around just war theory is a battlefield. It is occupied by a relentless inventory of different interpretations of what the Just War tradition is, how just war theory should be read and how it should be used. Clarke recommends that we see just war ‘at best’ as a ‘tradition’:

“a set of themes and tropes that has developed across centuries, and drawing from diverse strands of intellectual endeavour, ... subject to constant revision and adaptation. The specific emphases and the balance between its various components, have remained far from constant...[However], it is a living tradition that has demonstrated considerable persistence and adaptability.”³²⁹

For example, Alex J. Bellamy in his treatment of the Just War tradition *From Cicero to Iraq* demonstrates that Just War tradition is neither linear nor single in

³²⁷ Chris Brown. (2013). The Antipolitical Theory of the Responsibility to Protect, *Global Responsibility to Protect*, Vol. 5, Issue 4, pp. 423-442 and Carsten Stahn. (2007). Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?, *American Journal of International Law*, Vol. 101, Issue 1, pp. 99-120.

³²⁸ Ian Clarke. (2015). *Waging War: A New Philosophical Introduction*, Oxford Scholarship Online, p. 34.

³²⁹ *Ibid.*

its form. It is an amalgam of connected traditions, at times competing and at other times collaborative, drawing a framework under which acts of violence are to be judged.³³⁰ For Bellamy, the tradition “provides a legitimacy framework for war” that encompasses legality, morality and constitutionality through respectively positive law, natural law and political realism in historical progression.³³¹ Hence, what is to be realised as ‘just’ varies. This insistence in an articulation of the historical trajectory of just war thinking, followed by scholars of the just war tradition, results perhaps from the understanding that the nature of the arguments one can find in just war theory are political and contextual, located in historical epochs but also connected with contemporary ethical and security dilemmas of the use of military force. However, telling the story of the Just War tradition and articulating what is considered just in each historical epoch should not be seen as a neutral and apolitical exercise. In fact, as will be discussed later in this chapter, the existence of ‘classical’ or ‘contemporary’ approaches to just war theory, reveal that the approach one takes is a political position. Most of the time a historical trajectory of just war theory will culminate into various arguments favouring some causes and forms of war and delegitimizing others. In this sense, taking a position as to what is just and what just war theory upholds entails is a rhetorical activity. Rhetorical activity, especially concerning the use of military force for humanitarian purposes should not be an unchallenged and disregarded terrain of socio-legal analysis. For example, looking at international law as a rhetorical activity is significant in realizing the manufacturing and internalization processes of international rules and regulations regarding the rights to and in war. As O’Driscoll rightly states: “rhetoric is never merely rhetoric: it establishes the conditions of possibility that circumscribe international politics”.³³² It is argued here that just war theory and the responsibility to protect concept are primarily rhetorical tools, used as modes

³³⁰ Alex J. Bellamy. (2006). *Just Wars: From Cicero to Iraq*, Willey Press, Bellamy’s trajectory stretches from Antiquity to the Middle Ages, to Renaissance and Enlightenment, Modernity to Terrorism and Aerial bombardment.

³³¹ *Ibid.*, p. 7.

³³² Cian O’Driscoll. (2008b). *The Renegotiation of the Just War Tradition and the Right to War in the Twenty-First Century*, Palgrave Macmillan, p. 6.

of moral argumentation and as a specific discourse of international law on the use of force.

c. Punishing wrongdoing: the ambiguous origins of humanitarianism

The Christian approach to the problem of violence and war has been greatly influenced by Greek philosophy, most notably by Plato and Aristotle, Roman legal thinking and natural law precepts. The Christian and theological approach subsequently sustained, intellectually and juridically, the Western conception of the use of force. The intellectual pedigree of just war thinking emerges through the writings of theologians, such as Augustine of Hippo (St Augustine) and Thomas Aquinas. These theologians made great use of notions of good and of evil and of justness through faith.³³³ Medieval philosophy, and in particular medieval scholastics, played a significant role in expanding theories of natural rights and theories of rights in relation to war. Hence, just war thinking became more formally elaborated in medieval Europe and informed the early theories of international law during the seventeenth and eighteenth centuries.³³⁴

All of these theologians gave a primary emphasis on war as being a disdained ordeal on humanity even if a war is just.³³⁵ Aquinas in his *Summa Theologica*, begins his questions 'On War' by stressing that all wars are unlawful, and all wars are sinful.³³⁶ In this light, just war theories can be seen as a compromise between aggression and pacifism. Interestingly, throughout the Middle Ages and in the High Middle Ages, the crusade - as a juridical institution - was not assimilated into just war theories. Both ecclesiastical and scholastic writers were cautious to

³³³ St Augustine, *City of God*, Chapter 4, "The just live by faith", Habakkuk 2:4.

³³⁴ Ian Clarke. (2015). *Waging War: A New Philosophical Introduction*, Oxford Scholarship Online, p. 34.

³³⁵ St Augustine, *City of God*, Chapter 7: "As if he would not all the rather lament the necessity of just wars, if he remembers that he is a man; for if they were not just he would not wage them, and would therefore be delivered from all wars. For it is the wrongdoing of the opposing party which compels the wise man to wage just wars; and this wrong-doing, even though it gave rise to no war, would still be a matter of grief to man because it is man's wrong-doing."

³³⁶ Thomas Aquinas, *Summa Theologica*, Question 40: 'On War'.

involve the Church “legally in bloodshed”.³³⁷ The crusading activity of the papacy was also not accessible as a topic of canonistic jurisprudence; it was passed over in almost total silence.³³⁸ In contrast, one idiosyncratic element brought forward by the theologians of the Middle Ages, as well as the scholastic tradition, was the attempt to combine a universal natural law with just war and political theories of the common good. The writings of Francisco de Vitoria and the School of Salamanca, expanded on the understanding of just war as articulated by Aquinas and influenced these early theories of *jus gentium* (the law of nations). These works predisposed a turn towards secular jurisdiction: “Ironically, the real victors of the medieval just war were the new monarchs of early modern Europe.”³³⁹ The notion of justice became assimilated to that of legality.³⁴⁰ For example, the Decretalists, under the notion of supreme authority, turned away from considerations of just cause and towards considerations of authorities and jurisdictions.³⁴¹ Just war theories were thus viable to the extent that they corresponded to emerging transformations of order, for example to the rise of national monarchies.³⁴² Thinkers such as Francisco de Vitoria and Hugo Grotius, connected together various notions of the tradition, forming a Western cultural consensus on the use of force in international law.

Most of these seminal works on just war, natural rights and law, became celebrated in the course of the nineteenth and twentieth centuries, with the advent of international law and the juridical transformation of the post-1945 international order. Thus, they have also served the function of an intellectual basis for modern variants of just war theory and of accounts on the use of force for humanitarian purposes in international law. Again, to the extent they corresponded to the juridical transformations of historical international order.

³³⁷ Frederick H. Russell. (1975). *The Just War in the Middle Ages*, Cambridge University Press, p. 294

³³⁸ *Ibid.*, p. 295.

³³⁹ *Ibid.*, p. 303.

³⁴⁰ *Ibid.*, p. 297 and 298.

³⁴¹ *Ibid.*

³⁴² *Ibid.*, p. 299.

Dating back to St. Augustine and Thomas Aquinas, the primary responsibilities of the prince were the establishment and maintenance of order, both with regards to internal disobedience and external threats: the restoration of justice through the punishment of wrongdoing; and to reclaim captives or property that had been seized by neighboring armies.³⁴³ As Frederick H. Russell notes, Augustinian thought persisted and was incorporated in theories of both lawyers and theologians. Warfare was perceived “as a function of divine providence designed to punish sin and crime.”³⁴⁴ Further, Roman law provided that no one except a legitimate political authority could wage a just war under certain legal conditions.³⁴⁵ O’Driscoll suggests that in medieval times we find three just causes of war: punishment, the righting of a wrong and self-defence.³⁴⁶ This view can also be located in Suarez and Vitoria.³⁴⁷ This point is significant because it showcases that for those writers punishment was considered as a legitimate cause of war and explicitly used as a justification. Ernst Nys also suggests that Vitoria returns on this point on several occasions, by appealing to breaches of the law of nations which demands an authority able to protect the good and innocent from being harmed. Punishment for humanitarian reasons works as retribution.

Legitimacy to use violence for humanitarian purposes is also justified upon a feeling of love.³⁴⁸ War against the barbarous was considered unlawful unless invoked by a ruler for the purposes of protecting innocent victims.³⁴⁹ Punitive war entails the idea of enforcing the law and ridding the world of evil; “non

³⁴³ O’Driscoll, 2008b, *op cit.*, p. 78-79, “securing the peace by coercing the wicked and helping the good”, see also John Lagan. (1984). The Elements of St’ Augustine’s Just War Theory, *The Journal of Religious Ethics*, Vol. 12, No 1, pp. 19-38, p. 25 and the ‘Augustinian formula’ in David Luban, 2011, *op cit.*, p. 307.

³⁴⁴ Russell, *op cit.*, p. 292.

³⁴⁵ *Ibid.*, p. 293.

³⁴⁶ O’Driscoll, 2008b, *op cit.*, p. 3.

³⁴⁷ See for example, in Vitoria, *Des Indies*, p. 167, a lawful war is also one that is recourse against an evil-doer, citing St. Augustine, Vitoria says: “... just wars which are waged in order to avenge a wrong done, as where punishment has to be meted out to a city or state because it has neglected to exact punishment for an offense committed by its citizens or to return what has been wrongfully taken away”

³⁴⁸ See in Richard Tuck. (1999). *The Rights of War and Peace: Political Order and the International from Grotius to Kant*, Oxford University Press, p. 35. citing Gentili, *De Iure Belli*, “And if war against pirates justly calls all men to arms because of love for our neighbor and the desire to live in peace, so also do the general violation of the common law of humanity and a wrong to mankind.”

³⁴⁹ Tuck, *op cit.*, p. 74 to 75.

resisting love has sometimes to grapple with evil.”³⁵⁰ In this sense, humanitarian intervention is not only permitted it is necessitated. Indeed ‘Christian love’ and universalism together with Vitoria’s insistence on treating all peoples equally under a judicial system where “princes are posited as judges responsible for prosecuting any violation of natural rights on the writ of the law of nations” is what led James Brown Scott and others to celebrate Vitoria’s ecumenical humanitarianism and internationalism.³⁵¹ Vitoria became known to international lawyers and used in such extent, for his treatment of the Other, in relation to the newly found lands of America and its inhabitants.³⁵² These Others occupied newfound lands, full of riches and, *prima facie*, property not belonging to anyone and waiting to be claimed.

Las Casas, Sepulveda and Vitoria lived at a time of European expansionism and of conquest. The New World was discovered at the time of consolidation of the Spanish Empire. The discovery of the New World opened up the imagination of the Europeans, who attempted to consolidate early modern theories of natural law and rights with the emerging science of international law. It was an event: “the greatness of which cannot be exaggerated... the addition of an immense field to the theatre of human activity and the inclusion of the whole globe within the scope of man’s political activities.”³⁵³ Truthful to the Christian ‘love thy neighbour’, princes may carry out wars to protect the barbarians and indeed those suffering others from injustice.³⁵⁴ Jean Bethke Elshtain considers the work of St. Augustine, rather than Vitoria’s, as seminal for the practice of humanitarian

³⁵⁰ O’Driscoll, 2008b, *op cit.*, p. 82.

³⁵¹ To be exact Blane and Benedict Kingsbury, *op cit.*, pp. 252-253 note citing Grotius, Vitoria, Vasquez, Azorius, Molina and others maintained that an injury must be done in order to punish the wrongful state, and that this right derives from the law of nations. The right to punish in these writers is thus jurisdictionally restricted in a sense where the Law of Nations surpasses the Law of Nature, whereas Gentili and Grotius have a broader view of jurisdiction, the right of punishment derives force directly from violations of the Law of Nature and/or of the Law of Nations, see also Tuck, *op cit.*, p. 74, suggests that for Vitoria the law of nature is not a good sole basis for intervention.

³⁵² James Brown Scott. (2013). *The Spanish Origin of International Law: Francisco de Vitoria and his law of nations*, Publications of the Carnegie Endowment for International Peace, Division of International Law, The Lawbook Exchange, reprinted edition.

³⁵³ Franciscus de Victoria. (1917). *De Indis et de Ivre Belli Relectiones* (1471), Introduction from Nys Ernest, Classics of International Law Series, p. 64, Ernst Nys (1851-1920) was Belgian lawyer and professor of public international law in the University of Brussels. He also served as a member of the permanent court of arbitration.

³⁵⁴ O’Driscoll, 2008b, *op cit.*, p. 84.

intervention. Yet again, it is through the responsibility of the sovereign to care for the innocent.³⁵⁵

The right of punishment (*ius gladii*) which a majority of scholars trace in Grotius is a secular natural law right derived from the individual's right of chastisement.³⁵⁶ States in their capacity as individuals in the international realm retained this right.³⁵⁷ Thus, despite the religious connotations we still find in Grotius, the right to punish and the duty to protect are natural law rights of a law of nations, pertaining to the sphere of natural justice and of morality. It is in another sense a universal juridical ordering of the right of punishment and the obligation to defend the state, the order and individuals. It is in Grotius, Simon Chesterman suggests, that we can trace the origins of what became known as humanitarian intervention: "the quasi-judicial police measure of war against the immoral and the waging of war on behalf of others."³⁵⁸ In Grotius we can find in part an overt interconnection of punishment and of humanitarian intervention, associated with the protection of innocent aliens. According also to Lang:

"Grotius makes a stronger case for punishment as an action that can contribute to a just order by claiming that force can be used to punish those who violate the right of their own citizens... Grotius provides us with the first justification for a punitive intervention in support of human rights."³⁵⁹

Additionally, David Luban notes:

"the punishment theory of just cause is a corollary of one of Grotius's most important doctrines: the universal right of individuals to punish violations of natural law, which is a doctrine still cited today by proponents of humanitarian military intervention as well as of universal criminal jurisdiction."³⁶⁰

One needs not to reconstruct the whole Just War tradition, in order to uncover the traditions' *elements* of protection and punishment. Yet, just war theorists and

³⁵⁵ *Ibid.*, p. 144, O'Driscoll poses that this is not a standard reading of Augustinian thought suggesting that most just war theorists look to Augustine for his emphasis on submission to authority, even if there is oppression or tyranny, rather than for providing an interventionist ethic.

³⁵⁶ Tuck, *op cit.*, p. 88

³⁵⁷ *Ibid.*

³⁵⁸ Simon Chesterman. (2003). *Just War or Just peace? Humanitarian Intervention and International Law*, Oxford University Press, p. 10, citing Grotius's 'On Punishment' and 'On undertaking Wars on behalf of Others'.

³⁵⁹ Lang, 2009a, *op cit.*, p. 38, in general pp. 26-38

³⁶⁰ David Luban, 2011, *op cit.*, p. 311, Luban cites Hersch Lauterpacht. (1946). The Grotian Tradition in International law', *British yearbook of international law*, Vol. 23, pp. 1-53, at p. 46.

legal theorists have treated these elements as principles differently. For example, early modern theorists have broadly defined similarities yet maintain divergent views on the application of such principles.³⁶¹ There is not one consistent Just War tradition carrying both structure and principles to the modern period. The difficulty of genealogically mapping such principles lies in the diversity of interpretations and treatments of early modern texts by legal and just war scholars, who sought to construct them as dialogues between normative perspectives found in those early modern texts.³⁶² This is why the notions of love, of protection and punishment predominantly are treated here as elements and not as principles, as broad notions within rhetoric and language. Their advancement and configurations into rigid principles requires a much more detailed account which can only be done correctly through the reading of both the original texts and the various contradicting interpretations of scholars. This is a very interesting task, yet beyond the scope of this thesis.

Nevertheless, for the early modern writers, the articulation of war as a method of punishment was not eccentric.³⁶³ Luban asserts that the notion of punishing wrongdoing, which allows states to engage in war as a means of retribution, has been a constitutive element of Western just war theory since its inception. It was only during the last two centuries, Luban suggests, that theorists began to distance themselves from this theory of punishment. Most importantly it may be argued that the actual rejection of punishment theory did not take place until the end of WWII.³⁶⁴ Lest we accept one account over another on the origins of western humanitarianism, for the purposes of this argument, there is an essential

³⁶¹ For example for Gentili, unilateral war is allowed on behalf of human society, love and the desire to live in peace, whilst Wolff allowed only for collective intervention, Tuck, 1999, *op cit.*, p. 34 and Jeniffer Pitts. (2013). *Intervention and sovereign equality: legacies of Vattel*, in Stefano Recchia and Jeniffer M. Welsh (eds.), *Just and Unjust Military Interventions: European thinkers from Vitoria to Mill*, Cambridge University Press, p. 145.

³⁶² For an example of different interpretations see Benedict Kingsbury. (1997). A Grotian tradition of theory and practice? Grotius, Law and Moral Skepticism in the Thought of Hedley Bull, *Quinnipac Law Review*, Vol. 17, No. 3, p. 3-33 p. 17.

³⁶³ Blane and Kingsbury, *op cit.*, p. 241, citing Walzer: “the conception of just war as punishment is very old, though neither the procedures nor the forms of punishment have ever been firmly established in customary or positive international law”, further, “punishment has been a reason and a justification for intervention in much of the history of military practice, and it has been accepted by normative works in the western just war tradition.”

³⁶⁴ Luban, 2011, *op cit.*, pp. 269 to 300.

aspect underlying its practice. In just war theory it is its relationship with a punitive ethos, through the responsibility of the sovereign to protect the vulnerable, itself and the order.³⁶⁵ Sovereign authority holds both the right to protect and the right to punish. This suggests that it is an enduring element of any just war theory, whether rooted in divine or secular authority.

State behaviour implies that even with the advent of positivism and the Charter prohibitions on the use of force, both humanitarian and punitive practices were exercised, albeit not explicitly justified as such by states and parties. Gould asserted that international punishment in its Grotian version lost its prevalence in international society upon the introduction of *par in parem non habet imperium*. However, he proposes:

“this is not to say that state behavior changed entirely, but states had to go through more contortions to justify punitive action taken against another state, sometimes by legislating the *other* outside the bounds of international society, and increasingly by reference to what would become humanitarian intervention.”³⁶⁶

Indeed, the legal tradition of positivism in international law played a significant role here in removing an explicit justification of punishment.³⁶⁷ If one is to study the historical trajectory of ‘humanitarianism’ and ‘punishment’ from a strictly positivist and legal perspective, one is to assert that both were excluded or overtly limited upon the introduction of rigid conceptions of equality between sovereigns. Harry Gould suggests that “international punishment was rooted in and legitimated by a particular understanding of sovereignty and specific understandings of the source and character of obligation; in their absence, punishment could no longer serve to satisfy the *jus ad bellum* criterion.”³⁶⁸ It can be observed that with the creation of international legal institutions there was a transition from a broad notion of political authority to a more restricted notion of legitimate and legal authority. The notion of sovereignty and equal sovereignty

³⁶⁵ Identified also by Chesterman, *op cit.*, p. 10 and 11.

³⁶⁶ Harry D. Gould, *What Happened to Punishment in the Just War Tradition?*, in Eric A. Heinze and Brent J. Steele (eds.), *Ethics, Authority, and War: Non-State Actors and the Just War Tradition*, 2009, Palgrave Macmillan US, pp. 73-100, p. 81.

³⁶⁷ Luban, 2011, *op cit.*, p. 313, Luban argues: “Plainly, Walzer’s view, like that of the UN Charter, is inconsistent with the punishment theory”.

³⁶⁸ Gould, *op cit.*, p. 73.

could not logically entail a legal articulation of a right of punishment in its Grotian formulation.³⁶⁹ It seems that it is exactly the institutionalization of punishment in international criminal justice together with the Charter prohibitions, which made any reference to punishment as a just cause of war inconceivable.

What international law on the use of force post-WWII succeeded in doing was to further separate the *jus ad bellum* from *jus in bello*. Whatever the reasons for going to war (*jus ad bellum*), whether the war is just or unjust, its rules of conduct (*jus in bello*) always apply. Of course, this further distinction had profound consequences in international law post-1945. It cultivated the emergence of international criminal trials and the indictment of leaders for the commission of international crimes, as well as the creation of international humanitarian law. Significantly the majority of leaders, which were indicted by the ICC so far, are African.³⁷⁰ Nevertheless, the stricter separation of the rights to war and in war had another important ramification. *Jus ad bellum* considerations were significantly put aside. With the creation of the UN, its Charter and further with the establishment of the UNSC as the decision-making body on the use of force, the questions of right intention and just cause became entwined together with the last resort criterion. They were to be found legally in the resolutions of the UNSC. In practice this phenomenon pushes states to justify unilateral violence claimed on 'security threats', by stretching the meaning of the right to self-defence. Whereas the justification involves the defence of peoples in other countries, and whereas collective mechanisms are defective, the result fluctuates between an ex post facto legitimation or a condemnation.³⁷¹ International law is discredited irrespective of either the former or the latter result. These practices are most of the times straightforwardly punitive. The justification entails

³⁶⁹ Luban, 2011, *op cit.*, p. 315, citing Kant: "a war of punishment [bellum punitivum] between states is inconceivable, since there can be no relationship of superior to inferior among them."

³⁷⁰ This attitude has recently resulted in threats of mass withdrawals from the ICC, there is a wide literature on the issue of the politics of the international criminal court, see Alana Tiemessen. (2014). The International Criminal Court and the politics of prosecutions, *The International Journal of Human Rights*, Vol. 18, Issue 4-5, pp. 444-461.

³⁷¹ See ICISS report, *op cit.*, p. 54 to 55, see also Cassese, *op cit.*, pp. 23-30.

rationales of preventive protection, either for the state, the order, or individuals. An example of such justification was claimed by the US in 2003 against Iraq and Saddam Hussein in particular for the possession of weapons of mass destruction (WMDs). R2P broadly covers under one rather incoherent concept of international authority such uses of force. Thus, it also internalizes and institutionalizes the practice of punishment in such a jumbled framework. It is relevant to say here that in the case of an abuse, misuse or even non-use of R2P, its unfulfilled responsibility will not be taken as a result of state action but the result of the actions or inactions of the 'international community'. Blane and Kingsbury asserted:

“the idea of forcible punishment of states and peoples is for good reason regarded by most international lawyers, if they think about it at all, as an awful one. At its extremes it might seem to countenance annexation and annihilation of states, genocide and ethnocide of peoples, terrorism and arbitrary violence without any trials, and self-appointed thugs adding a sheen of legality to their violent imposition of their own values and power... [however] ...*standard political logics of international relations recognized by international lawyers lead toward a logic and indeed a practice of punishment.*”³⁷²

Through this lens, it is the language of punishment as a rhetorical justification that has been banished and not the notion of protection through punishment. Instead, the punishing of wrongdoing through protection in the form of humanitarian interventions was also, in this sense, institutionalized. Further, if the logic and practice of punishment is carried out in a legal framework but becomes articulated through it as practices of protection, how do we define or describe punishment? Who is being protected and who is being punished? Is it the state, the order, or the individual?

Protection in defence of rights, whatever these rights may be, can transform into a war punishing violations of order. In this sense what seems to be important is the moral and legal framework of order. In fact, there are two important things to notice. First, the enduring criterion of legitimate authority makes a just war theory an end in itself. It begins and finishes in authority even if others are its occasional beneficiaries. So different variations of just war thinking as applied ethical techniques of weighting justness may differ yet the role and power of

³⁷² Blane and Kingsbury, *op cit.*, p. 263.

authority to exact punishment and deliver it as protection within the order remains intact. Secondly, it is the practice of war and the use of violence to deter or avenge a wrong committed that amounts to punishment.³⁷³ Thus, it is not only intention or motive that makes war as punishment. The criterion of legitimate authority is perhaps much more important. Perceived in this form, the practice of humanitarian intervention is what comes closer to policing. The imposition of justified moral or legal violence in military form, exacted through international institutions, can be seen as a method of disciplining and punishing. Rationales of protection turn out to also be acts of either disciplining or punishing. The interplay of protection and punishment is not a juridical phenomenon of a particular historical epoch, it is an element rooted in notions of political and legal authority - of power more broadly. International authority promises to maintain peace and security. These claims need to be understood as moral claims of protection *and* punishment, not merely as claims of protection.

d. 'Classic' vs. 'contemporary' approaches to Just War

According to Johnson the 'unified common tradition' of the Augustinian and Thomist theories with a 'coherent and systematic form' broke apart at the beginning of the modern period.³⁷⁴ Johnson distinguishes a classical form of just war theory from contemporary reinventions, which begins with Grotius and the secular application of various terms of just war thinking and natural law. He distinguishes a second stream with writers such as Pierino Belli dealing with the conduct in war. Further, a third stream, in the "realm of secular philosophy, eventuating in the 'perpetual peace' movement of the enlightenment era and "effectively losing contact with the just war idea as reflecting perennial necessities of statecraft."³⁷⁵ Johnson's historical view of the tradition assumes that it only serves its ethical purpose when it is applied as it was conceived in its

³⁷³ *Ibid.*, p. 248.

³⁷⁴ James Turner Johnson. (1975), *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, (1981), *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts*, (1987), *The Quest for Peace: Three Moral Traditions in Western Cultural Ethics*, Princeton University Press.

³⁷⁵ Johnson, 2006, *op cit.*, 169.

‘classical form’. The shift from a presumption against injustice to a presumption against war (1945) represents for Johnson a discontinuity in thinking, a divorce in our thinking between ethics and responsible statecraft. Johnson primarily wants to read the tradition in its classical formulation because he believes that ethical praxis is the result of its application, the application of the ‘authentic’ Just War tradition.

The presumption against injustice for Johnson means a couple of things. Firstly, that just war should be read primarily as Christian, rooted in Aquinas.³⁷⁶ Proper authority in this case is related to the conception of the Aristotelian good of the community and of order. Authority in this sense is further interlinked with the idea of the Augustinian ‘*tranquillitas ordinis*’, which can also be traced to Aquinas and his *Summa Theologica*.³⁷⁷ Under this order of peace, transgressions of international peace should be met and wrongdoing punished. Evil should be accountable to justice. In Johnson’s hands, Christian love draws together the writings of Ramsey, Suarez, Vitoria, and Augustine, and serves as a key thematic line in the historical development of the Just War tradition.³⁷⁸ For O’Driscoll: “Crucially, it is presented as producing a strongly interventionist ethic that does not distinguish between neighbor and stranger.”³⁷⁹

Just war thinking, in Johnson’s eyes, historically and explicitly allows for war as punishment, including ‘humanitarian war’. This thinking contradicts both cosmopolitan and liberal internationalist accounts of just war, which claim that the essence of the just war theory framework is the regulation and delimitation of war with the exceptional cause of protecting human rights. The underlying element in the presumption against war rests on the moral claim that peace cannot be brought by war. It rejects violence as a means of achieving justice. Following Paul Ramsey, Johnson suggests that the twentieth century presumption against the use of force, except in self-defence, that is reflected in

³⁷⁶ Johnson, 2009, *op cit.*, p. 249 and O’Driscoll, 2008b, *op cit.*, p. 78.

³⁷⁷ Thomas Aquinas, *Summa Theologica*, Question 29, also O’Driscoll, *op cit.*, 2008b, p. 78.

³⁷⁸ O’Driscoll, *op cit.*, 2008, p. 65.

³⁷⁹ *Ibid.*

Article 2(4), is “alien to the Just War tradition properly understood.”³⁸⁰ The presumption against the use of force and thus the formulation of exception is a ‘middle ground’.³⁸¹ Johnson claims that the international legal position against preemptive use of force takes justice out of the *jus ad bellum*. Further, that the aggression-defender model (i.e that the first use of force without an armed attack shall always be prohibited), protects the current international order at the expense of justice. For Johnson the legal decision-making institution on the use of force, the Security Council in its present form, is unable to fulfill the demands of international justice. Thus, Johnson regards international authority as presently ineffective. Hence, *responsibility for moral judgments* in defence of order, peace and the common good can be fulfilled by individual sovereign states. The responsibility in defence of order and of the common good of community extends from the domestic realm to the international. In such a world, punishment is of elementary importance. It is both the position of Jean Bethke Elshtain and Johnson that power carries more responsibility. Thus, the United States considering its powerful position can be the guarantor of international peace and security. Such accounts aim to return exclusive authority to use violence to the state, and not just any state.³⁸²

Significantly, Johnson’s critical stance towards the ‘aggressor-defender’ model of international law, that is, as he suggests a pre-1999 doctrine, shifted with the introduction of the responsibility to protect concept. He particularly interpreted the concept as a return to the just war framework and hence, a return to a presumption against injustice. In his own words: “In 2001 The Responsibility to Protect (...) appeared, using (without identifying it) a just war framework to justify actions that override state sovereignty in the name of fundamental justice.”³⁸³ For Johnson it seems that the *concept* of the responsibility to protect is not problematic, quite the contrary. Rather, Johnson’s issue is rather who has the

³⁸⁰ *Ibid.*, p. 73.

³⁸¹ *Ibid.*, p. 76 and Johnson, *op cit.* 2006, on the pastoral letters, pp. 176-180.

³⁸² Jean Bethke Elshtain. (2003). *Just War against Terror: The Burden of American Power in a Violent World*, Basic Book, 2004.

³⁸³ Johnson, 2006, *op cit.*, p. 256.

right to use it. Johnson's historical treatment is useful in disclosing the persistence of intertwined themes throughout the tradition - of 'vindictive justice' and of 'Christian love', of punishment and protection. Johnson's treatment also reveals that the responsibility to protect perhaps emerges through a presumption against injustice. As we shall see, his treatment works as a counter-claim to contemporary just war thinking and their uncritical insistence on treating the Just War tradition as a resource for a neutral and unproblematic juridico-moral framework on the use of force for human protection purposes. As already discussed, the *explicit* use of war as punishment did not banish because of an ethical transformation of the role and application of punishment in contemporary society but because it was assimilated into the centralized authority of collective security institutions. In this sense punishment became naturalized and rationalized. The argument made here is that the echoed demoralization of the post-1945 order was either superficial or temporary. It lasted as long as the transition of the former colonies into sovereign states lasted and as long as communism challenged the domination of capitalism.

Alex J. Bellamy, a proponent of the responsibility to protect concept and a contemporary just war theorist, is unhappy with Johnson's historical claim.³⁸⁴ For Bellamy the prudential criteria drawn from the Christian Just War tradition are not incompatible with the rules of the use of force of the post-1945 order.³⁸⁵ Instead, the question of recourse to war is correctly located in the mandates of the Security Council. Its consensus-based decisions tackle the serious problem inherent in the Just War tradition; namely, unilateral uses of force based upon

³⁸⁴ Alex, J. Bellamy. (2008). 'When is it Right to Fight? International Law and the *Jus ad Bellum*', *Journal of Military Ethics*, vol. 8, pp. 231-245, see generally on the historicism of Johnson's just war approach and the distinction between 'classical' and 'contemporary' just war theory approaches the discussion in the same volume of the *Journal of Military Ethics*, "James Turner Johnson and the Recovery of the Just War Tradition", Cian O'Driscoll, Hedgehog or Fox: An essay on James Turner Johnson's View on History, pp. 165-178, John Kelsay, James Turner Johnson: Just War Tradition and Forms of Practical Reasoning, pp. 179-189, Nahed Artoul Zeh, James Turner Johnson and the 'Classical' Just War Tradition, pp. 190-201, Anthony F. Lang, The Just War Tradition and the Question of Authority, pp. 202-216, Serena K. Sharma, The legacy of *Jus Contra Bellum*: Echoes of Pacifism in Just Contemporary Just War Thought, pp. 217-230, Alex, J. Bellamy, When it is Right to Fight? International Law and the *Jus ad Bellum*, pp. 231-245, James Turner Johnson, 'Thinking Historically about Just War', pp. 246-259.

³⁸⁵ Alex, J. Bellamy. (2013). *The responsibility to protect: A defense*, Oxford University Press, Introduction.

individual just causes and unilateral conceptions of justice.³⁸⁶ Bellamy's position is one shared by 'juridical' just war thinkers of a cosmopolitan character (hereinafter, 'legal cosmopolitans'), by pro-R2P proponents and by liberal internationalists.³⁸⁷ This strand of juridical just war combines international law, the authority of UNSC and ethics as just war theory. This position is the most prominent among both academics and policy-makers - it is the UN's position. For this strand, just war theory represents more of a concern with the legitimacy of the use of force, and less of a reflection on the use of force as such.³⁸⁸ It is a method of casuistry and does not question the moral claims of the theory. The thinking of the juridical/cosmopolitan just war theorists is similar to that of liberal institutionalists. Some examples are Robert Keohane and Allen Buchanan.³⁸⁹ The ideal scenario for pro-R2P supporters is to further institutionalize the responsibility to protect concept and establish a broader consensus. Pro-R2P supporters tend to show quite surprising levels of faith in the decision-making powers and nature of the UNSC and to international institutions broadly. The difference between Johnson/Elshtain and Bellamy, the juridical/cosmopolitan just war and liberal institutionalist camp, is not so much the distinction between a presumption against war and a presumption against injustice. It is their conceptions on proper authority that differ; in other words their distinction is on agency. It is more a procedural distinction than an ethical or a substantive one.

³⁸⁶ *Ibid.*

³⁸⁷ Rengger, *op cit.*, makes a distinction between juridical and cosmopolitan just war thinkers. He situates Bellamy in the juridical just war tradition. He includes Walzer in the same tradition. I also view Walzer's work as a precursor to Bellamy's. Where I depart from Rengger is where Rengger distinguishes between cosmopolitan and juridical just war theory. I contend that Bellamy's just war thinking is not substantially different from legal cosmopolitans. Yet, this uniformity is in reference to R2P. See also David Levy and Natan Sznaider. (2004). The Institutionalization of cosmopolitan morality: the Holocaust and Human Rights, *Journal of Human Rights*, Vol. 3, Issue 2, pp. 143-157, p. 155.

³⁸⁸ Rengger, *op cit.*, p. 90.

³⁸⁹ Allen Buchanan. (2006). Institutionalizing Just War, *Philosophy and Public Affairs*, No. 1, pp. 2-38, p. 34 and Allen Buchanan and Robert O. Keohane. (2004). The Preventive Use of Force: A Cosmopolitan Institutional Perspective, *Ethics and International Affairs*, Vol. 18, pp. 1-22, Allen Buchanan. (2003). Reforming the international law of humanitarian intervention, in Holzgrefe and Keohane, *op cit.*, pp. 130 – 173, Buchanan argues that states seeking to promote human rights must adhere to certain criteria, a position similar to the unilateral interventionist ethic and the concept of 'supreme emergency' we find in Wheeler, *op cit.*

Louise Arbour's position on R2P helps to illustrate that the distinction is procedural rather than moral. She explicitly links the responsibility to protect concept (humanitarian war) to war as punishment.³⁹⁰ Her position can be situated in the legal cosmopolitan camp. Arbour suggests that both the Convention on the prohibition and punishment of Genocide and the *Genocide* case represent "a recognition of genocide as part of international law deserving of punishment,"³⁹¹ and that the elements of R2P, including the element of punishment, flow from the established rules of the criminalization of genocide. In relation to the Genocide case, she furthermore argues: "the key legal lesson in the Court's opinion is that the prevention of Genocide is a legal obligation, and it is a justiciable obligation that one state effectively owes to the citizens of another state, outside its own territory."³⁹² Arbour makes her case in support of the norm as a "duty of care" by focusing upon the established ICISS pillars of the concept, that is to prevent, to react and rebuild. She grounds her argument on the legacy of the Genocide Convention, as part of a "collective toolbox", a blueprint for action, which for her furthers and boosts this new vision of human security. She remarks that the concept is about creativity and flexibility and "should not become a conceptual – and operative – straightjacket".³⁹³ She has faith in strategies and mechanisms such as "early-warning development", "fact-finding", "good office diplomacy", "sanctions", "institution activation", "resource allocation", and an overall conviction that the "UN are equipped to help States implement the doctrine".³⁹⁴ She seems to be willing to accept that the bad days are gone and that a bright future of working international institutions will pave the way, of not only reacting to, but preventing mass atrocities and being capable of engaging in post-conflict reconstruction: "it presents itself with intellectual clarity, political usefulness, and I hope, eventually legal enforceability."³⁹⁵ Her conviction for the soundness of the doctrine and its legal quality is grounded on

³⁹⁰ Louise Arbour. (2008). The responsibility to protect as a duty of care in international law and practice, *Review of International Studies*, Vol. 34, pp. 445-458.

³⁹¹ *Ibid.*, p. 450, in p. 451, The same status of crime under international law pertains to two other kinds of conduct which R2P specifically seeks to prevent and punish: war crimes and crimes against humanity.

³⁹² *Ibid.*, p. 451.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*, p. 458.

³⁹⁵ *Ibid.*, p. 458.

the belief that the norm embraces the victim's point of view rather than questionable state-centric motivations. It does so, by configuring a permanent duty to protect individuals against a state's criminal behaviour. Arbour's hope is more centralization, more universalization, more institutionalization.

In contrast, Carsten Stahn, also a lawyer, explicitly cautions against the use of R2P as a punitive tool and against folding criminal justifications with justifications for military intervention for human protection purposes. For Stahn this understanding becomes possible if we attend to the "semantics of intervention", that being how the intervention was morally justified.³⁹⁶ In the context of the Syrian conflict, the moral justifications of humanitarian protection, punishment and deterrence on the threat or use of military force were all asserted at the same time. In September 4, 2013 Barack Obama stated:

"We have been very clear to the Assad regime but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation."³⁹⁷

Between August and September in 2013, military air strikes were considered as a response to the alleged use of chemical weapons by the Syrian government against civilians but were averted through a political and diplomatic settlement under Security Council Resolution 2118 (2013). Stahn claimed that rationales and justifications of criminal law should not be used in relation to the threat or use of force. In other words, the criminal language of deterrence, punishment and accountability should remain within the scope of individual criminal responsibility and should not transgress into the area of state responsibility. According to Stahn: "humanitarianism was invoked as entitlement to justify

³⁹⁶ Carsten Stahn. (2013). Syria and the Semantics of Intervention, Aggression and Punishment: On 'Red Lines' and 'Blurred Lines', *Journal of International Criminal Justice*, Vol. 11, Issue 5.

³⁹⁷ Glenn Kessler. (2013, September 6). President Obama and the 'red line' on Syria's chemical weapons, *The Washington Post*, Retrieved from [washingtonpost.com](http://www.washingtonpost.com), note here the similarities and differences in Obama's and Trump's rhetoric in response to the alleged use of chemical weapons by the Syrian government; both demonstrate a punitive ethos however, Trump's rhetoric relies more on emotion, in Harding, *op cit*.

action that is ‘punitive’ in nature, outside the realm of self-defense or collective security.”³⁹⁸ Further, he suggests:

“under a practice of humanitarian logic, safety and protection must take precedence over accountability interests... discourse in military intervention turned this logic on its head and used protection as a means to achieve accountability through military force.”³⁹⁹

Stahn makes an attempt to ‘save’ the concept from overarching abuse by attaching to R2P a less coercive attribute: “R2P has never been purely an enabling tool to facilitate intervention. It serves as a constraint to unilateral action.”⁴⁰⁰ Stahn’s remarks are noteworthy and expose the contradictory logics inherent in R2P. However, the ICISS did not *ban* unilateral action, it *tacitly accepts and morally justifies* such military actions by ‘coalitions of the willing’.

To make a point, the linking of authority and protection, says Orford “is presented as a solution to the problem of creating political order in situations where such order is non-existent”.⁴⁰¹ The fact that Bellamy, Johnson, Arbour and even Stahn can find consensus under R2P is worrying. Because they claim to occupy such different positions in relation to thinking about war, there consensus indicates that R2P can fulfil different functions for diverse actors. Their agreement highlights the inadequate and contradictory ethical, political and security claims which underpin the concept, and confusion over conceptions of proper authority. This is perhaps the result of adapting and reinventing a tradition in a rather uncritical manner.

e. Walzer’s ethics and R2P

³⁹⁸ Stahn, 2013, *op cit.*, p. 960.

³⁹⁹ *Ibid.*, p. 967, Stahn used the Genocide case contrary to Louise Arbour suggesting that it will be a serious drawback to link intervention to the ‘old argument’ that states may commit crimes. In contrast, Louise Arbour uses the Genocide case to argue that the prevention of genocide from which the responsibility to protect emerges is a legal obligation, which a state owes both domestically and internationally, see Arbour, *op cit.*, p. 451.

⁴⁰⁰ *Ibid.*, p. 962, Stahn asserted that the 2005 Summit Document Outcome transformed R2P from a concept facilitating intervention to a UN principle reinforcing state sovereignty and state equality.

⁴⁰¹ Orford, 2011, *op cit.*, p. 119.

Michael Walzer's theory of just war has been incorporated into the U.S Military Academy as a standard text and subsequently it became a key text for a variety of military conferences and lectures on the morals of war. It has also served as the basis for a new generation of moral accounts on just war, humanitarian intervention and the responsibility to protect concept. As Orford stated: "R2P is the logical end-point of the arguments made in *Just and Unjust Wars* and more broadly by the pro-humanitarian activists of the 1990s."⁴⁰² Walzer's theory of just war is one that is espoused by a wide spectrum of academics and policy makers. As such, both broad and narrow accounts of just war find their home in Walzer's just war theory. Most importantly, Walzer's theory can be deployed both as a restraint to the conduct of war but also be used as a strategic tool to justify violence. *Walzer's just war theory is not an attempt to minimize violence and conflict but rather to naturalize the use of force.*

Walzer's work was not the first attempt to revive just war theory during the post-WWII period. In 1968, Paul Ramsey had already suggested that the moral claims of going to war and of conduct in war, based on Christian and theological just war reasoning traced back to St. Augustine and Thomas Aquinas, produce prudential statecraft and responsible use of force.⁴⁰³ Johnson followed Paul Ramsey closely. Walzer's original input however, was his own declared detachment from theologically oriented Just War. *Just and Unjust Wars* made little reference to classic just war thinkers. Walzer posed that the moral arguments made in *Just and Unjust Wars* are part of the common language we use in arguing about war. The account of justice expounded in Walzer's just war is ontologically grounded in morality, reason and human rights. Walzer produces a rights based just war theory, which he suggests sits between the apologetic realist argument, "all's fair and natural in war", and the insufficient 'legalist

⁴⁰² Anne Orford. (2013). Moral Internationalism and the Responsibility to Protect, *European Journal of International Law*, Vol. 24, No. 1, pp. 83-108, p. 100, in this article Orford stated that Walzer's view of the problem of humanitarian intervention in *Just and Unjust Wars* represented a radical departure most prominently because of his position on relying on morality, justice, evidence and "the present character of the moral world" in order to assess the justness of a war.

⁴⁰³ James Turner Johnson. (1999). Just War in the Thought of Paul Ramsey, *The Journal of Religious Ethics*, Vol. 19, No. 2, Special Focus Issue: The Ethics of Paul Ramsey, pp. 183 – 207.

paradigm' of positive international law.⁴⁰⁴ Rengger calls Walzer's theory the "compassionate view", that war must sometimes be necessarily fought but it must also be possible to fight it justly and well.⁴⁰⁵ From this lens, Walzer's attempt is reminiscent of the scholastic tradition and of early modern theorists that ended up in forming a Western cultural consensus on the use of force combining elements of natural law, just war and the emerging laws of nations. Likewise, from the same lens it overlaps with contemporary just war approaches such as Bellamy's.

Walzer's disclaimer, written as an introduction to the book, represents a reference point for his methodological approach and offers some insights into his moral thinking on war more broadly. It is Walzer's claim that he is writing as a political activist and a partisan. He is concerned: "precisely with the present structure of the moral world".⁴⁰⁶ The argument of the book, he states, is "a comprehensive view of war as a human activity and a more or less systematic moral doctrine."⁴⁰⁷ Even though Walzer claims to be introducing as to the "common language" of just war, he also describes a constituting, historical and contextual nature of war. Specifically, he says: "At particular points in time, it takes shape in particular ways, and sometimes at least in ways that resist 'the utmost exertion of forces.' What is war and what is not-war is in fact something that people decide (I don't mean by taking a vote)."⁴⁰⁸ The constructivist account of war, which Walzer provides here, contradicts his major claim of an ethics of just war of an ecumenical character with transcendental appeal.

Appealing both to broad and narrow accounts of just war reasoning, suggests an appeal to broad and narrow just causes of war. Additionally, appealing both to broad and narrow conceptions of use of force point out to flexible categories of 'crimes' and 'wrongs'. As Walzer claims: "the argument of justice incorporates

⁴⁰⁴ Michael Walzer. (1977). *Just and Unjust Wars: A moral Argument with Historical Illustrations*, Basic Books, Fourth Edition, Preface, xix to xxv.

⁴⁰⁵ Rengger, *op cit.*, p. 52.

⁴⁰⁶ Walzer, 1977, *op cit.*, p. 107.

⁴⁰⁷ *Ibid*, preface.

⁴⁰⁸ *Ibid.*, p. 24.

prudential considerations.”⁴⁰⁹ Nonetheless, he does not have a problem in admitting the casuistic character of his theory. Walzer’s historical illustrations open up a forum of argumentation in which the theorist, the philosopher, or the individual can then incorporate their own political thesis on a particular case, without nullifying Walzer’s elementary just war principle – the defence of life and liberty. It is not hard to think, then, why Walzer’s theory is attractive to so many audiences. In his own words: “the formula is permissive, but it implies restrictions that can be usefully unpacked only with reference to particular cases.”⁴¹⁰ The historical illustrations presented in the book are opening up a territory of competing claims and are an open field for revision and expansion. Walzer here suggests open-endedness in terms of the possibilities of both revision and of the moral judgments we are to make.⁴¹¹ Constraints are only posed through the case studies as casuistic and reflective judgments on the merits of each case. Here, Walzer makes an appeal to *reason*. Reading history and telling a narrative in which particular claims to justness are made is a political act. It can be both revolutionary, to open up new possibilities for present dilemmas, but it can also preserve certain ethical understandings.⁴¹² Therefore, using historical cases to provide constraints or criteria in relation to war is not unproblematic or neutral. It justifies the politico-ethical aims of the narrator. In this case, it satisfies Walzer’s aim in revising the ‘legalist paradigm’.⁴¹³

Both in the introduction and throughout the book, Walzer indicates that the vocabulary of international law is an insufficient account of ‘our’ moral arguments. Equating international law with the UN he says: “its decrees do not command intellectual or moral respect”.⁴¹⁴ This vocabulary and language, “the legalist paradigm”, is grounded on the theory of aggression, which derives its essence from the domestic analogy, however “sometimes” this analogy for Walzer

⁴⁰⁹ *Ibid.*, p. 67.

⁴¹⁰ *Ibid.*, p. 85

⁴¹¹ *Ibid.*, p. 73.

⁴¹² Ronan O’Callaghan. (2015). *Walzer, Just War and Iraq: Ethics as a Response*, Routledge, p. 13-15.

⁴¹³ Walzer, 1977, *op cit.*, p. 73.

⁴¹⁴ *Ibid.*

is not sufficient.⁴¹⁵ States or ‘political communities’ retain their rights to territorial integrity and political independence, as individuals possessing rights and duties within a state. Even though Walzer declares that he wants to depart from legalist accounts, in great extent he grounds his version of humanitarian intervention in legal terms, and particularly to a state-centred conception of rights. The rights to life and liberty represent for Walzer the elementary rights of collective living. The moral standing of a state depends upon the protection of both individual life and liberty and ‘shared’ life and liberty. “Given a genuine contract”, he says, “it makes sense to say that territorial integrity can be defended in exactly the same way as individual life and liberty.”⁴¹⁶ Walzer does not consider regime change as a just cause, yet, he understands that in such cases intervening states have a mandate for political but not for cultural transformation. In addition, prolonged and sustained regime change, (in the form of trusteeships and protectorates), is to be preferred than a short intervention, and democracy as the system of governance. It is not hard to see the difficulty here in a mandate for political but not for cultural transformation.⁴¹⁷ The line that separates the cultural from the political realm is a very thin one, arguably marginal and perhaps even fictional.

One of the most curious features of Walzer’s account, is a continuous oscillation between the particular and the universal. It is an account of justice grounded both on the diversity of individual cultural and political communities and in a universal rights theory. This oscillation mirrors the concept of authority in the responsibility to protect concept. Both responsibility and political authority oscillate between the state and the international. This phenomenon can be described as a tension between moral authority and universal jurisdiction.

Arguably, both the humanitarian element in *Just and Unjust wars* and the appeal to justice and morality, transforms Walzer’s arguments into a presumption

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*, p. 54.

⁴¹⁷ *Ibid.*, p. 2.

against injustice and not a presumption against intervention. In 'Arguing about War' published in 2004, Walzer becomes even more permissive: "I haven't dropped my presumption against intervention but I have found it easier and easier to override the presumption."⁴¹⁸ In Walzer, one can trace the 'right to humanitarian intervention', a right which is based upon the notion of 'crimes that shock the conscience of the mankind'.⁴¹⁹ In fact, Walzer poses: "... the doctrine I shall expound is in its philosophical form a doctrine of human rights."⁴²⁰ The paradoxes and inquiries of rights (intention, violence to halt violence, war to end war) are 'subsidiary'. Humanitarian intervention is for Walzer what comes closer to law enforcement and police work. Thus, as discussed in the previous section, humanitarian rationales are here explicitly linked with punitive ones. If a government is engaged in massacres it is a criminal government, in such a case intervention is morally justified and any state that is capable of stopping the slaughter has a right to do so.⁴²¹ In one sense, Walzer was ahead of his time in terms of valuing the rights of individuals and human rights as the centre of a just international order. This is not to suggest that arguments favouring intervention in defence of human rights were not already taking shape. While Walzer claims that international lawyers were only concerned with the letter of the law, lawyers were also already addressing the moral arguments against the blank prohibition to non-use of force.⁴²² Sovereignty was increasingly being comprehended as contingent upon compliance with certain moral universal standard of human rights.⁴²³ For example, David Luban advocated for a reworked version of Just War and *jus ad bellum* and for a redefinition of the concept of legitimacy and of the definition of aggression. In his view, a redefinition of sovereignty should be read as follows: "A legitimate state has a

⁴¹⁸ Michael Walzer. (2004). *Arguing about War*, Yale University Press, p. 2.

⁴¹⁹ *Ibid.*, Preface, xix.

⁴²⁰ *Ibid.*, p. xxiv.

⁴²¹ *Ibid.*, p. 107.

⁴²² *Ibid.*, p. 91, see also the legal debates in chapter One of this thesis.

⁴²³ Charles Beitz. (1979). "Bounded Morality: Justice and the State in World Politics," *International Organization*, Vol. 33, No. 3, pp. 405-424, Gerald Doppelt. (1978) Walzer's Theory of Morality in International Relations, *Philosophy and Public Affairs*, Vol. 8, No. 1, pp. 3-26, David Luban. (1980). Just War and Human Rights, *Philosophy and Public Affairs*, Vol. 9, No. 2, pp. 160-181, Richard Wasserstrom. (1978). Review of Just and Unjust Wars: A Moral Argument with Historical Illustrations, *Harvard Law Review*, Vol. 92, No. 2, pp. 536-545.

right of aggression because people have a right to their legitimate state.” Luban also asserted that: “the concept of sovereignty is morally flaccid, not because it applies to illegitimate regimes but because it is inconsistent to the entire dimension of legitimacy.”⁴²⁴

Under the present definition, both legitimate and illegitimate states are protected from foreign intervention and this is what, for Luban, is morally and legally problematic. Illegitimate states should lose their right to non-intervention. Consequently, *jus ad bellum* and just war theory should be directly defined with reference to human rights while discussions regarding states are deemed unnecessary.⁴²⁵ An illegitimate state shall be legally estopped from international protection. Luban criticizes Walzer (and John Stuart Mill) by claiming that both Mill and Walzer are wrong to evaluate legitimacy on grounds of self-determination and horizontal consent,⁴²⁶ and advances a theory of sovereignty grounded upon the protection of, what Luban calls, “socially basic human rights” attached to the principle of proportionality, as the minimal criterion for the state’s legitimacy.⁴²⁷ Luban rests his case on what he considers successful regime overthrows and interventions, such as the Nicaraguan revolution in 1978 against the Somoza regime, Tanzania’s aggression towards Uganda and the conquest of Cambodia by Vietnam. He further regards the juxtaposition of the rights of states on the one hand, and socially basic human rights on the other, as “incommensurable”.⁴²⁸ These arguments are similar to the arguments made by the lawyer Fernando Tesón, however Tesón also adds that this thinking is the liberal case for humanitarian intervention and is self-consciously Kantian.⁴²⁹ When there is “overwhelming evidence” that the state enjoys no legitimacy, proved by “active and virtually universal struggle against it” an intervention is “morally justified, even in the absence of massacre and slavery” and subsequently,

⁴²⁴ Luban, *op cit.*, p. 166.

⁴²⁵ *Ibid.*

⁴²⁶ Luban distinguishes between horizontal and vertical consent, *op cit.*, p. 167.

⁴²⁷ *Ibid.*, p. 174.

⁴²⁸ *Ibid.*

⁴²⁹ Fernando Tesón. (2003). The Liberal Case for Humanitarian Intervention, in Holzgrefe and Robert Keohane, *op cit.*, pp. 93-129. p. 106 to 107

the *jus ad bellum*, should be “casuistically stretched” to correspond to moral judgment.⁴³⁰

Even though Luban and Tesón criticize Walzer at several points, their arguments are not starkly different, however, Luban and Tesón propose a slightly more flexible theory on the use of force in defence of human rights. All reflect the position in support of humanitarian interventions where other states or the ‘international community’ have a moral reason to intervene; for Walzer the life and liberty of individuals is defensible and for Luban and Tesón some socially basic human rights must always be upheld. Nevertheless, the historical context in which Walzer and Luban wrote did not allow for the ‘re-moralization’ of international order just yet. Cold war dynamics and the involvement of powerful states in intra-state conflicts, the arms race and the fear of nuclear annihilation suggested that for international law and the UN in particular it was safer to stick to the non-intervention prohibition.⁴³¹

Ronan O’Callaghan suggests that Walzer’s ethics are ‘auto-effective’.⁴³² It is an ethics based on similarity rather than alterity: “ethical responsibility begins with the coherent communal subject and responsibility is defined in terms of the relations between members”.⁴³³ The existence of a coherent self-determining subject makes the inter-communal rules of war possible. For O’ Callaghan, who uses Derrida’s concept of subjectivity as critique, Walzer’s autopoietic understanding of subjectivity, community, as well as meaning, is ontologically insufficient.⁴³⁴ This O’Callaghan suggests is a form of ‘secular theology’, since the discourse on rights provides Walzer with a universal structure through which the latter is able to theorize morality in war.⁴³⁵ In Walzer’s own words: “What we ought to do when we face outward is determined by divine or natural law, or by a conception of human rights, or by a utilitarian calculation in which everyone’s

⁴³⁰ *Ibid.*

⁴³¹ Orford, 2013, *op cit.*, p. 93.

⁴³² O’ Callaghan, *op cit.*, p. 20.

⁴³³ *Ibid.*, p. 24.

⁴³⁴ *Ibid.* p. 21.

⁴³⁵ *Ibid.*

interest, and not those up and down the hierarchy, must be counted.”⁴³⁶ The extent in which Luban, for example, differentiates with Walzer, is not ontological. In fact, the origin of their ethical responsibility is quite similar. Instead of attending to an idea of a coherent self-determining subject, Luban, Tesón and Bellamy, begin with a coherent ‘international’ subject and then responsibility is defined in terms of ‘their’ shared values, as liberal and equal members. This version of ethical responsibility is still an ethics based on similarity rather than alterity. It is not the place here to discuss the implications of a global ethical responsibility towards the other, through an ontology that begins with a coherent self, this will be discussed in chapters 3 and 4. What needs to be emphasized here, is Walzer’s appeal to a language of rights as the foundation of his just war theory. Rengger also suggests that: “to structure an account of the tradition on the basis of rights language and social contract theory inevitably slots into the form of modern political vocabulary that engages in ‘rights talk’, and what follows from that”.⁴³⁷ Walzer in effect *re-moralizes the use of force and fixes the terms of critique and debate*: “Indeed, how can imperial warfare be criticized if not in just war terms? What other language, what other theory, is available for such a critique?”⁴³⁸

f. Cultural hegemony and liberal international law: structural punishment as critique

The correlation of medieval international law to those of Roman Law, says Carl Schmitt, was not to be found in the precepts themselves but in the ‘concrete orientation’ to Rome.⁴³⁹ *Nomos*, for Schmitt, are laws whose: “content is the inner measure of concrete order and orientation”, and should be divorced from all other legal enactments. *Nomos* in the Schmittian account contains the initial

⁴³⁶ Walzer, 2004, *op cit.*, p. 25.

⁴³⁷ Rengger, *op cit.*, p. 87.

⁴³⁸ Walzer, 2004, *op cit.*, introduction.

⁴³⁹ Carl Schmitt. (2006). *The Nomos of the Earth in the International law of Jus Publicum Europaeum*, Telos University Press, p. 59. Note on the historical concept of the restrainer: the *katechon*, Empire was “the historical power to restrain appearance of the Antichrist and the end of the present con.”

distribution of land and the appropriation of the concrete's order space.⁴⁴⁰ The only "corrective" modern definition of *nomos* is the concept of legitimacy.⁴⁴¹ The *nomos* of a historical spatial order, we can argue, manifests as an intellectual tool that helps us visualize and identify the sovereign power and its dimensions and spaces, its political sphere of dominance.⁴⁴² Medieval international law was to end with a new spatial order that is the sovereign state, grounded not in a secure orientation, but in a balance or equilibrium. The epoch of inter-state international law, as Schmitt notes, lasted from the sixteenth century to the end of nineteenth century, in which European powers sought to limit and bracket war. This epoch was one of increased secularization, or as Schmitt notes, of the "detheologization of public life and the neutralization of the antitheses of creedal civil wars."⁴⁴³ This bracketing of war, or war proper, took place only between sovereign states, by "distinct *personae morales*, who contented with each other on the basis of the *jus publicum Europaeum*, because European soil had been divided under their aegis."⁴⁴⁴ This 'humanization' of war, to prevent wars of annihilation between European powers, transformed the basis of justness: "the justice of war was no longer based on conformity with the content of theological, moral or juridical norms, but rather on institutional and structural quality of political forms."⁴⁴⁵ Some jurists still considered the importance of 'just cause', as formulated from the scholastic tradition, in Schmitt's opinion at the expense of any consideration of the juridical ordering of the sovereign states.⁴⁴⁶ According to Schmitt:

"this spatial order and its concepts of balance was the essential presupposition and foundation upon which the European Great Powers based their practical policy of colonial expansion into the free spaces of the globe from the seventeenth to the nineteenth century. Their balance theories allowed them to disregard the theoretical implications of the basic problem of their global spatial structure: the relation of free and non-free land."⁴⁴⁷

⁴⁴⁰ *Ibid.*, p. 69 to 70.

⁴⁴¹ *Ibid.*, pp. 71 to 77.

⁴⁴² *Ibid.*, pp. 69 to 77.

⁴⁴³ *Ibid.*, p. 140

⁴⁴⁴ *Ibid.*, p. 141

⁴⁴⁵ *Ibid.*, p. 142, '*justus hostis*': war could take place among just enemies, equally sovereign states.

⁴⁴⁶ *Ibid.*, p. 160, citing Grotius to Vattel.

⁴⁴⁷ *Ibid.*, p. 161.

Under that orientation, a specific character was given to those who had “no *jura belli*”.⁴⁴⁸ In fact, their mere existence, treatment and labelling as ‘traitors’, ‘rebels’, and ‘pirates’ (see ‘rogue’ states), legitimized the political, cultural and legal registers of that specific world-system. If that system was unequal and violent, international law naturalized it.

The right to appropriate and use the land of the ‘barbarous’ was established through arguments advancing a just war.⁴⁴⁹ Schmitt writes:

“In terms of international law, just war provided the legal title for occupation and annexation of American territory and subjugations of the indigenous peoples. There were additional grounds for just war by Spain, against the Americans that, in modern parlance, would warrant ‘humanitarian intervention.’ Such grounds gave Spaniards rights of occupation and intervention if they were interceding on the part of people in their own country being suppressed unjustly by barbarians.”⁴⁵⁰

The Schmittian narrative of international law is well known in critical scholarship. Schmitt’s perspective on international law highlights the colonial history, the mechanisms of sovereignty and provides for an alternative concept of international authority. It is an account which legal cosmopolitans or juridical just war theorists are not comfortable with. It implies that the concept of moral authority is interlinked with a specific orientation, an order that produces ‘Others’. Their exclusion naturalizes that specific order. Drawing on the Schmittian concept of authority and legitimacy, the responsibility to protect concept can be seen as an attempt to sustain and protect a homogenous legal, moral and institutional order through morality or reason. However, this is achieved by means of the exclusions of those who do not ascribe to the same universal project, the civilized from the uncivilized, the European from the non-European and so on. Any state, which does not meet these standards, risks delegitimization. As Anne Orford claimed: “Institutions that represent international criminal law or economic liberalization exercise a form of jurisdiction that is based upon a claim to represent the truth.”⁴⁵¹ Orford’s analysis emphasizes the ways in which protection works to delegitimize appeals to *de jure* authority. The

⁴⁴⁸ *Ibid.*, p.164.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*, p. 109.

⁴⁵¹ Orford, 2011, *op cit.*, p. 186.

claim to protection marginalizes the question of authority. In other words, the question and paradoxes of both state and international authority can sabotage the already existing structure of executive decision-making. According to Orford: “their capacity to govern depends not upon control over territory, but upon the success of their officials (experts on human rights, development economics, conflict studies, or genocide prevention) in spreading the beliefs underlying Western legality throughout the world.”⁴⁵² Universal jurisdiction is intimately associated with such ‘truth’ claims. The truth claim in the responsibility to protect concept is that it promises to minimize suffering by stopping mass slaughter or that it can halt mass atrocities and violence. Conversely, if the responsibility to protect produces suffering, or is a punitive tool, then it risks discrediting itself as an institution of protection. The conceptual distinction between protection and punishment, if one turns critically to the question of international authority, sovereignty and moral/ethical agency, seems significantly paradoxical and problematic. It is associated with what liberal international law promises to be and what it actually is.

In the same vein, Gerry Simpson narrates the story of the development of the international legal order since the naturalization of the sovereign state as the foundational aspect of international law.⁴⁵³ Simpson argues that the ‘flexible’ concept of ‘juridical sovereignty’, since 1815, is marked by: “the languages of Great power prerogatives, friends and enemies (or outlaws) and sovereign equality.”⁴⁵⁴ It is important to note that, for Simpson, all these three are to be seen as *languages*. Furthermore, Simpson argues that the structure of the international order is best understood by the oscillation between what he calls a pluralist order and an anti-pluralist one. A pluralist order is one that subscribes to a universal morality that is attached to equality. An anti-pluralist order is one that

⁴⁵² *Ibid.*

⁴⁵³ Gerry Simpson. (2004). *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press, p. 210. In Simpson’s words, his view, is a ‘slightly modified’ view of the classical English school account of society: “it is inspired partly, by Bull’s social or institutional understanding of the Great Powers and by Martin Wight’s view that the outlaw state in some way defines a particular approach to international order.”

⁴⁵⁴ *Ibid.*, p. x.

encompasses the stronger and equal states of the order and the ‘outlaws’, the ones that cannot fit morally, constitutionally or politically, within the established ‘international legal life’ or order. Through this analysis, the international order is characterized by normatively opposing orders. Simpson develops the concept of *legalized hegemony*, that being the production of new legal regimes “in moments of constitutional crisis” as the Great Powers see fit.⁴⁵⁵ The existence of ‘outlaws’ and ‘outsiders’ of the international order negatively validates their juridical equality.⁴⁵⁶ Those outlaws are, according to Simpson: “subject to a repressive international criminal law and denied the benefits of full sovereign equality.”⁴⁵⁷ There are plenty of examples of such states with varying degrees of ‘criminality’ depending upon their potentiality of being a hazard to the order in place or exclusively to powerful states.⁴⁵⁸ States that acquired the ‘intolerant’ status since the nineteenth century, include, to state the obvious cases: Napoleonic France, Ottoman subjugated Greece between 1821-1832, Hitler’s Germany, Stalin’s Commune, the ‘Taliban-troubled’ Afghanistan, Hussein’s Iraq, Qaddafi’s Libya in 2011 and now Assad’s Syria. Such states are denied participation as equals on the basis of “some moral or political incapacity.”⁴⁵⁹ According to Simpson, ‘civilization’ since the middle and late nineteenth century was a key term:

“One attribute of civilization was a liberal or at least pseudo-liberal legal order in which alien (read Western) nationals would be afforded full liberal rights. Those entities excluded from the system were thought incapable of ensuring this level of protection and were thus deprived of certain sovereign rights and jurisdictional immunities in ‘unequal treaties’ and capitulations.”⁴⁶⁰

What matters for the argument made in this chapter, is that international law and its international legal order, as historically observed by Simpson, is structured upon a *systematic exclusion* of some ‘Others’. The exclusion of the immoral, ‘failed’, or rogue other, validates the morality and legal institutional life of the democratic and peaceful republics of the rest.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*, p. 231

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*, p. 235.

⁴⁵⁹ *Ibid.*, p. 235.

⁴⁶⁰ *Ibid.*, p. 234, also Wallerstein’s analysis points out that Europe in the Middle Ages was characterized by ideological superiority, there existed a Christian “civilization”, yet no world-empire, nor world-economy, see in Wallerstein, 2011, *op cit*, p. 37.

For Mark Neocleous, the idea of ‘civilization’ was intimately linked with the birth of police.⁴⁶¹ According to Neocleous, both push towards a legislative and administrative regulation of an internal life:

“At the heart of pacification, then, are the practices we associate with the police power: the fabrication of social order, the dispersal of the mythical entity called ‘security’ through civil society and the attempt to stabilize the order around the logic of peace and security.”⁴⁶²

It is the exercise of security practices as also policing, which I wish to emphasize here. Neocleous suggests that pacification is itself a form of war, and war is in fact a central element of the post-WWII legal order. I assume that this is what Neocleous means when he says, “war proper is peace proper”.⁴⁶³ Through this lens, the risks of banishing punishment from the legal vocabulary or not reading the Just War tradition for what its central elements are, namely, the punishment of wrongdoing and the protection of order, blurs the distinction between military interventions for human protection purposes, humanitarianism (the work of international organizations, such as MSF or the Red Cross) and international policing (unilateral or collective punitive interventions). Against scholars such as James Brown Scott, who in the reading of Vitoria see a determinate humanitarian and cosmopolitan ethos, Neocleous situates Vitoria’s contribution to an emergent discourse of political economy centred on commerce and accumulation. Koskenniemi also makes this reading, and it is an important critical point, against the perception of R2P (and just war theory within R2P) as a neutral and non-ideological juridico-moral framework.⁴⁶⁴ Neocleous argues that primitive accumulation and colonialism had served the pursuit of territorial security and justified intervention, subjugation and annexation of foreign lands.⁴⁶⁵

For Tarik Kochi, contemporary accounts of just war theory, like those of Walzer fail because of their “uncritical reliance upon a number of assumptions about the

⁴⁶¹ Mark Neocleous. (2014). *War Power, Police Power*, Oxford University Press, pp. 133-136.

⁴⁶² *Ibid.*, p. 34.

⁴⁶³ *Ibid.*, pp. 1-25.

⁴⁶⁴ Martii Koskenniemi. (2011). Empire and International Law: The Real Spanish Contribution, *University of Toronto Law Journal*, Vol. 61, Issue 1, pp. 1-36.

⁴⁶⁵ Neocleous, *op cit.*, citing Mikael Horuquist, p. 25.

nature of ‘morality’, ‘justice’ and ‘reason’, accounts which take as a given the morality of human rights and deify them as the moral panacea of our times.”⁴⁶⁶ Through Vitoria, Kochi shows how humanitarian, or “well-meaning approaches to war” as he suggests “can end up an apology for aggressive violence, war and conquest.”⁴⁶⁷ Via natural law or human rights, and through casuistic reason which frames what is ‘just’ or ‘unjust’, ‘natural’, ‘good’ and ‘evil’, human security makes up an ethics of war and violence for which moral rhetoric can serve a binary and often contradictory end. The lines that separate oppression from emancipation and protection from punishment or exploitation are obscure. According to Kochi:

“In Vitoria’s time, the so-called ‘universal truth’ preached was really *one* version or interpretation as enunciated by one Christian sect, Catholicism (albeit with degrees of internal divergence within the Catholic framework). Today, while universal concepts such as ‘freedom’, democracy and human rights are invoked by Western political leaders and their lawyers, what is being preached and often violently inflicted upon the world, is only *one* particular interpretation of these concepts – an interpretation which is fundamentally limited and shaped by a system of modern capitalism. To this extent contemporary humanitarian just wars are often as unholy and ungodly as those waged by the Spanish conquistadors against the Amerindians, or by the earlier Christian Crusaders against the empires of Islam.”⁴⁶⁸

To this end, Immanuel Wallerstein’s world-system analysis allows us to visualize the wide network of forces that constructively create and re-create the world-system we live in. It is the normative conditions we need to seek and understand. Concepts, for Wallerstein, are comprehensible only within the social and historical framework of their times.⁴⁶⁹ World-analysis allows us to see actors and structures as part of a process; part of a systemic mix out of which they emerged and upon which they act. Under this understanding actors:

“act freely but their freedom is constrained by their biographies and the social prisons of which they are part. Analyzing their prisons liberates them to the maximum degree that they can be liberated. To the extent that we each analyze our social prisons, we liberate ourselves from their constraints to the extent that we can be liberated.”⁴⁷⁰

⁴⁶⁶ Tarik Kochi. (2009). *The Other’s War: Recognition and the Violence of Ethics*, Birkbeck Law Press, p. 23 and 24

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*, 41 to 42.

⁴⁶⁹ Immanuel Maurice Wallerstein. (2004). *World-Systems Analysis: an introduction*, Duke University Press, p.1.

⁴⁷⁰ *Ibid.*, p. 22.

Wallerstein's analysis represents an exegesis of the connection between the different forces at play within the world-system of global capitalism circa 1500. Wallerstein emphasizes the inequalities produced within the international system focusing on long-term (the *long duree*) expansion. He traces the beginnings of the modern world-system in the sixteenth century, in parts of Europe and the Americas. This world-system is a world-economy based upon a division of labour⁴⁷¹, and the exchange and flows of commodities, capital and labour.⁴⁷² Capitalism is the system's systematic expectation towards the constant and 'endless accumulation of capital'.⁴⁷³ According to Wallerstein:

"The powers that be in a social system always hope that socialization results in acceptance of the very real hierarchies that are the product of the system. They also hope that socialization results in the internalization of the myths, the rhetoric, and the theorizing of the system."⁴⁷⁴

The internalization process is based upon the coexisting relationship of on the one hand universalism and on the other anti-universalism. In part, Wallerstein's exegesis can be seen as similar to Gerry Simpson's narrative of the development of international order (i.e. pluralism/anti-pluralism). For Wallerstein, universalism improves the ability to accumulate capital by ensuring an efficient competent working world-economy (and a working world-system) and anti-universalism highlights the struggle of the 'inferior classes' and of the excluded ones (the terrorists, the barbarians, the infidels, 'rogue' states).⁴⁷⁵

A basic feature of the world-system is its core-peripheral state system.⁴⁷⁶ Weak states, in Wallerstein's analysis, are those of which the production processes are

⁴⁷¹ Wallerstein, 2011, *op cit.*, p. 127, refers to the division of labor and the combination of coerced and free labor as the 'secret' of capitalism, which in turn allowed unequal development to come into existence.

⁴⁷² See in Wallerstein, 2011, *op cit.*, p. 100, the mass of the population of Europe and its colonies was engaged in coerced labor, a system defined, circumscribed, and enforced by the state and its juridical apparatus.

⁴⁷³ Wallerstein, 2004, *op cit.*, p. 24 and in Wallerstein, 2011, *op cit.*, p. 77, citing Karl Marx, the creation in the sixteenth century of a world embracing commerce and a world-embracing market were the 'key variables' for the emergence of capitalism as the dominant mode of social organization.

⁴⁷⁴ *Ibid.* p. 37, he furthermore adds, that "antisystemic socialization can be useful to the system by offering an outlet for restless spirits, provided the overall system is in relative equilibrium."

⁴⁷⁵ *Ibid.*, p. 41.

⁴⁷⁶ Wallerstein, 2011, *op cit.*, p. 87-112 and p. 91, see "Coerced cash-crop labor", the dominant system of labor in agricultural production: the peasants were required through legal state controls to labor at least

peripheral and accumulate less wealth through economically productive activities, or wealth is substantially concentrated to some barons and warlords that monopolize production.⁴⁷⁷ Within this world-system, strong states are pressuring weaker states:

“to keep in power persons whom the states find acceptable, and to join the strong states in placing measures on other weak states to get them to conform to the policy needs of the strong states..., weak states ...buy the protection of strong states by arranging appropriate flows of capital”.⁴⁷⁸

The ‘balance of power’, in Wallerstein’s interpretation, can be seen as the competition between strong states in realizing dominance.⁴⁷⁹ The European world-economy emerged in late fifteenth and early sixteenth century and attained its strength by the attempts of the authorities to create relatively homogeneous societies at the core of empires, using the imperial venture as an aid, perhaps an indispensable one, to the creation of national society.⁴⁸⁰ The kings, for example, says Wallerstein, used four mechanisms to strengthen themselves: bureaucratization, monopolization of force, creation of legitimacy, and homogenization of the subject population.⁴⁸¹ Furthermore in moments of ‘crisis’ the capitalistic forces of the world-system cannot prosper, since the flow of capital and labour is uncontrollable.⁴⁸² These forces would then reassert themselves by engaging in other activities, cultural, legal or economic, that would enhance their status and control.⁴⁸³ Wallerstein’s definition of ‘geoculture’, is the power of hegemony over the line which divides the excluded from the included; the included society represents the good society.⁴⁸⁴

The epitome of liberalism, according to Wallerstein, in defining the geoculture of the modern world-system would not have taken place if it were not for the legal

part of the time on a large domain producing some product for sale on the world market, see the *Encomenderos* in Hispanic America.

⁴⁷⁷ Wallerstein, 2004, *op cit.*, p. 53-54.

⁴⁷⁸ *Ibid.*, p. 55.

⁴⁷⁹ *Ibid.*, p. 57.

⁴⁸⁰ Wallerstein, *op cit.*, p. 68, the European world-economy included by the end of the sixteenth century not only northwest Europe and the Christian Mediterranean (including Iberia), but also Central Europe and the Baltic region.

⁴⁸¹ Wallerstein, 2011, *op cit.*, p. 136.

⁴⁸² Wallerstein, 2004, *op cit.*, p. 58.

⁴⁸³ Wallerstein, 2011, *op cit.*, p. 339.

⁴⁸⁴ Wallerstein, 2004, *op cit.*, p. 60.

underpinnings of liberal state institutions.⁴⁸⁵ The hegemony of legal rationality and of international law, as critique, even it may not provide a blueprint for a better system, does nonetheless bring to light the inherent inequalities of the law, its anti-universalisms and law's incoherent and selective application. Hegemony can be seen as the 'organizing principle': "an entire system of values, attitudes, beliefs, morality, etc. that is one way or another supportive of the established order and the class interests that dominate it."⁴⁸⁶ Agreed law has the power to induce "passive compliance in large measure through its function as constitutive of social ontology. It provides rules for the proper construction of authorized institutions and approved activities."⁴⁸⁷ The cultural hegemony of law is a "code that replicates the social ontology in much the very same way that a genetic code replicates a biological organism."⁴⁸⁸ It forms in part our 'objective reality'. For Antonio Gramsci: "the establishment of a worldview requires the mechanisms of universalization, naturalization, and rationalization."⁴⁸⁹ Domination extends in all spectrums of life, both private and public, in the same way structural inequalities and power relations penetrate through the public and private spheres of life. In this respect, the role of law is to perform, in part, "a non-repressive function of leadership and direction by suggesting a mode of life as 'legal', as approved by the state."⁴⁹⁰ Scholars such as Michel Foucault and Pierre Bourdieu, in an effort to break away from Orthodox Marxism and class as the single unit of oppression, developed a broader conception of power as diffused at multiple sites.⁴⁹¹ Broadly, the internal ideology of the dominant group is maintained through the network of social institutions and practices. As Litowitz notes, for critical legal theory, the postmodern era shifted the operative terminology from

⁴⁸⁵ *Ibid.*, p. 67.

⁴⁸⁶ Carl Boggs. (1976). *Gramsci's Marxism*. Pluto Press, p. 39.

⁴⁸⁷ Douglas Litowitz. (2009). Gramsci, Hegemony, and the law, *Brigham Young University Law Review*, pp. 515-551. p. 546.

⁴⁸⁸ *Ibid.*, p. 521, In Gramsci's early writings, hegemony is used in Leninist fashion to designate the socialist strategy by which the proletarian class rises (...) in a secure position of power by making concessions to other groups: the dominating class assumes power by representing itself as the agent of other classes.

⁴⁸⁹ *Ibid.*, p. 525, universalization: parochial interests and obsessions of dominant group as the common good of all, neutralization: the reification of a "culture" as "nature", rationalization: every ruling group gives rise to a class of intellectuals who perpetuate the existing way of life at the level of theory.

⁴⁹⁰ *Ibid.*, p. 530.

⁴⁹¹ Michel Foucault. (2009). *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, St Martins Press.

‘class/exploitation’ to ‘discourse/marginalization’. It is a move towards an understanding that focuses on the pluralism of domination forces and how they infiltrate the law, its social institutions and social relationships.⁴⁹²

According to Beate Jahn, liberal hegemony rationalized various policies, which were based on domestic liberal assumptions and attempted to internationalize them. One such assumption is that democracy provides the means “of managing and resolving domestic conflict and competition”.⁴⁹³ However in practice, ‘democracy promotion’ carries with it liberalization policies, the protection of private property, free markets and free trade and has enabled the creation of ‘illiberal states’.⁴⁹⁴ Since the responsibility to protect is arguably to be carried out by mostly western liberal states, the universalization claim inherent in the responsibility to protect rationalizes these liberal policies. Subsequently, the claims of security and of protection of human rights become intertwined with the ideological discourses of liberalism.

The emergence of the institutionalization of human rights as a result of the unipolar global order has been described as a return to ethics and to natural law.⁴⁹⁵ Costas Douzinas pointed out that, human rights are in fact a morally invested ideology.⁴⁹⁶ The common denominator of human rights and natural law is their universality; “they are supposed to be above politics, a neutral, rational discourse, natural discourse and practice and a ‘moral trump card’ that brings conflict to an end.”⁴⁹⁷ As a language they carry an emancipatory aspect, since the emergence of natural law and natural rights constituted a direct confrontation and eventual (albeit partial) overcoming of the irrational impositions of tradition.⁴⁹⁸ Yet, their universality and their institutionalisation was also the

⁴⁹² Boggs, *op cit*, p. 63, Orthodox Marxism for Gramsci often reified concepts like ‘class’, ‘party’, and ‘mode of production’ and losing sight of the individual human actors that made up larger social units.

⁴⁹³ Jahn Beate. (2013). *Liberal Internationalism: Theory, History, Practice*, Palgrave Macmillan, p. 2

⁴⁹⁴ *Ibid*, see also for relevant analysis China Mieville. (2009). *Multilateralism as Terror: International Law, Haiti and Imperialism*, *Finch Yearbook of International Law*, Vol. 18.

⁴⁹⁵ Costas Douzinas. (2000). *The End of Human Rights*, Hart Publishings, Oxford.

⁴⁹⁶ *Ibid.*, p. 11

⁴⁹⁷ *Ibid.*, citing Michael Ignatieff.

⁴⁹⁸ *Ibid.*, p.12.

beginning of their demise, their 'end'. The promotion of such rights by Western states often creates contradictory results: on the one hand it may serve to protect particular individuals yet it may also hamper political resistance.⁴⁹⁹ Antonio Hardt and Michael Negri also have stated that the institutionalisation and universalization of human rights is a characteristic of "Empire".⁵⁰⁰ Used, as a strategic tool and language by politicians and diplomats, human rights and democracy, can be both revolutionary and anti-revolutionary, both anti-militant and militant, both violent and non-violent. Perhaps as a tool of authority human rights lose their emancipatory potential.

In essence, just war theory and the responsibility to protect are moral and highly politicized doctrines. They represent certain beliefs and claims, which the *de facto* legitimate authority holds. Historical events, epochal changes and transitions in power are therefore the conditions, and perhaps the only conditions, which alter the moral claims inherent in these doctrines. The uncritical appeal to a rights-based language or to 'reason' and human rights (see Bellamy's and Walzer's claim that just war theory is a "common language") located in much of the contemporary accounts of just war theory and pro-R2P arguments, conceals the constitutive role of legal institutions in the production of a wider juridico-liberal framework tied up to a particular historical moral vocabulary and to a specific socio-political and economic world-system. The responsibility to protect concept, needs to be understood through this lens, so that its normativity can be acknowledged. The presumption against war, which in Johnson's eyes, echoed the de-moralization of the order, seems to be a superficial distinction. In practice, just causes were still asserted, to justify both unilateral and collective military intervention for human protection purposes.

Whilst someone like Johnson or Elstain make aggressive claims and broaden the just cause threshold, as opposed to the more restricted moral claims of Bellamy or Walzer, their conception offers us a counter-claim to the "common language"

⁴⁹⁹ *Ibid.*, p. 293

⁵⁰⁰ Michael Hardt and Antonio Negri. (2000). *Empire*. Harvard University Press.

of Walzer and Bellamy. Johnson's claims can be seen as outright political and moral claims, whilst Walzer and Bellamy camouflage the inherent political nature of their arguments. The rationalization of international constitutionalism, the 'war convention', natural law, positive law (its rules and entities) works to *legitimize* the juridico-moral framework of just war theory and to overshadow the concepts of international authority, moral hegemony and power per se. Through this lens, the ethical landscape of the Just War tradition adapts and stretches, reinventing a concept of authority, of sovereignty and of responsibility, which fits the specific conditions of the world-system. Yet it achieves that by bypassing or not adequately investigating the problem of authority, of discipline and punishment, of inclusion and exclusion, or of institutional violence more broadly. The return to just war theory, in the form of the responsibility to protect concept, ignores some of its deeply rooted elements and their interplay in the contemporary rhetoric of political and legal authority. The conditions and ethical vocabularies that make exclusion possible should be addressed and assessed. Here, Kochi's argument is illuminating, he says:

"If just war theory cannot incorporate the critique of reason into its intellectual discourse, then we are probably better off setting the theory aside. A mode of theorizing about war which does not or cannot consider how competing concepts of justice and authority, and the desire of empowerment and realization within human rationality, *together*, underlie violence, conflict and war, is not an adequate theoretical approach. Opposed to the inadequacy of just war tradition, theoretical approaches that pursue these significant questions need to be developed."⁵⁰¹

According to Jahn, the failures of liberal policies have to be attributed to the incoherencies of liberalism itself. As such, it is not liberal practice that failed liberal policies but its liberalism's failure to 'grasp' the dynamics of liberal practice and of the world-system it creates and re-creates.⁵⁰² Accordingly, *the responsibility to protect should be understood not as a failed liberal practice alone, but as part of liberalism's failure to attend to the wider dynamics of its world-system*. Further, the non-recognition of the punitive ethos of the responsibility to protect should be understood as the failure of liberalism to 'grasp' liberalism's exclusions and inclusions. In terms of law, to realize that liberal international law

⁵⁰¹ Kochi, 2009, *op cit.*, p. 47.

⁵⁰² Jahn, *op cit.*, p. 195.

is also the result of the violent history of colonialism and European exploitation, that came about through the rhetoric of universal ethics and liberal political culture. As Orford states:

“At the heart of the establishment of international law, was, and is, the legitimacy of the violence exercised as sacrifice or punishment against those constituted as law’s savage, barbaric, others. In this sense the international community shares something with those national or ‘tribal’ communities against which it constitutes itself – the wounding and killing of its others as an organic and necessary part of its foundation.”⁵⁰³

Through this lens, the punitive element of protection is not only exercised through practice, but it is also structural/foundational. Further, a notion of ethical responsibility that takes structural violence as its point of departure, perhaps begins to ease the tension between what international law promises to be and what it is. In other words, it goes into some distance to curtailing the problem of a theoretically emancipatory international law but in practice hegemonic. This is not to discredit international law, in fact, international law is being discredited when incoherencies and failures are not recognized as such but are covered under the rubric of rights and of just collective security institutions. It is to push towards a radical understanding of responsibility on human suffering that accounts for its own failures and for its complicity in violence. The institutionalization of human rights and the subsequent emergence of a new security agenda, which made conceivable the introduction of the responsibility to protect concept, became promising upon the defeat of communism as a claimant of international legal and political authority against capitalism. Therefore, what most of contemporary juridical and liberal accounts of just war often over-look, is the constitutive relationship of just war and of morality to a particular geo-political, economic world-system. Their persistence suggests a failure to account for, or an indifference to engage with critical approaches to international law, which are particularly helpful in identifying the inherent paradoxes in international law and the systematic exclusion of some Others. Critical approaches to international law and international security, is an expanding literature, which comprises of post-colonial literature, feminist approaches and socio-historical accounts of international law. These accounts tend to highlight

⁵⁰³ Orford, 2003, *op cit.*, p. 196 to 197.

the inequalities of international society against its formal, promised or professed legal equality, most of the times through history, and through international law's constitutional moments. Whereas protection and punishment become entwined and are institutionalized, it is only through these critical accounts that we can perhaps see who is being excluded, why and how. Therefore, an understanding of how is it that liberal moral authority and international legal authority naturalizes and masks discourses of exclusion is fundamental, if we are to attend to some of the problematic features of broadly accepted and unaccounted violent practices.

Concluding remarks

This chapter argued that the punitive ethos of protection post-1945 was not abolished but became naturalized and rationalized. Through this lens, the international criminalization of social and political violence under international legal institutions and its main security institution (the Security Council) are not to be seen only as institutions of protection, they are also institutions of punishment. The responsibility to protect concept, and the reinvention of just war theory within R2P should therefore be seen in this light, in order to grasp its ethico-political claims and effects. The wider dynamics and paradoxes of the relationship between protection and punishment is an underexplored phenomenon. The chapter argued that 'critical accounts' to liberal international law, just war theory and human rights are able to uncover some of the internal contradictions and paradoxes of approaches that take as given, respectively, the juridical equality of international law, the 'rationality' of the juridico-moral framework of just war theory and the moral adherence and respect for human rights. By highlighting the non-recognition of the binary and coexisting relationship of protection and punishment, both in just war thinking and in the responsibility to protect concept, this chapter aimed to provide three distinct but connected directions which underpin current frameworks of R2P. Firstly, to examine in 'classical' and 'contemporary' manifestations the moral claims of just war theory. Secondly, to investigate the extent to which just war theory, as the predominant intellectual component of the responsibility to protect concept, can

meet the demands of an ethical inquiry on legitimate uses of violence for protection purposes. Thirdly, to make a primary assessment of the kind of ontologies, world visions and what kind of international law is imagined through the responsibility to protect as just war theory. The next chapter turns the lens to the internal and structural conditions of the responsibility to protect concept, in an attempt to probe deeply into the meaning of 'responsibility' within R2P.

CHAPTER THREE

THE IRRESPONSIBILITY OF THE RESPONSIBILITY TO PROTECT

Introductory Remarks

Chapter 1 told the story of the development of R2P, the process of its institutionalization and internalization. The previous chapter (2), untangled the relationship between the concept of the responsibility to protect and the moral, political and juridical claims of just war thinking. As such, the chapter highlighted the limitations, inherent problems and contradictions of just war thinking that become part of the concept of the responsibility to protect. It aimed to show why the revival of the juridico-moral framework of just war thinking in the responsibility to protect concept, particularly by pro R2P supporters, liberal internationalists and legal cosmopolitans is at best an uncritical appraisal. The central argument in the previous chapter was that just war theory and the responsibility to protect, as juridico-moral frameworks of international authority and as security institutions, work as techniques of both protection and punishment - that the theory and practice of humanitarianism hides a particularly punitive dimension. It argued that the 'non-recognition' of the punitive dimension of humanitarianism is part of liberalism's failure to recognize its exclusion practices within protection practices and structural punishment as an integral part of its existence. This failure is not a coincidence; it is a political and ethical choice. In this sense, *the liberal internationalist assumption proceeds by overshadowing R2P's punitive dimension under the rubric and language of protection.*

The responsibility to protect concept implicates us primarily to recapture agency and authority within the contemporary post-Cold War structure. To the extent that one realizes that international law is liberal with a European (western) orientation, formulated on the inclusion and exclusion of forms of life, R2P is a liberal concept emanating from the same source. Therefore, a critique of the

responsibility to protect populations from human rights atrocities is in part a critique of the liberal juridico-moral concept of responsibility. R2P entails the responsibility of the ‘international community’ to protect populations from mass atrocities and large-scale loss of life, if the state is ‘unwilling or unable’ to fulfil its responsibility. The term ‘international community’ indicates that it possesses moral agency.⁵⁰⁴ Yet, the ‘international community’ is an elusive subject. I am interested in exposing the *structure of answerability* towards mass human atrocities and its subjects, that is why my intentions in this chapter are: (1.) to understand the agential materiality of the international community, (2.) to explore modes of organizing responsibility/irresponsibility within R2P and (3.) to make some primary assessments of the meanings and effects of the sites of irresponsibility within R2P. To this end, the juridico-moral framework of R2P is a rhetorical activity. To the extent that “vocabularies act as ‘ideologies’”, this chapter exposes the “strategic choices that are opened” through the concept, in the midst of growing global security apparatuses and complex international life.⁵⁰⁵ Broadly, this chapter is about the *irresponsibility* of the responsibility to protect.

An insight of chapter 2, was that legal cosmopolitan appeals to universality or liberal appeals to morality and vice versa, seek to elevate the just war vocabulary and the language of the responsibility to protect and ‘fix’ there the terms of the debate. In other words, we become witnesses to the furtherance of a dominant discourse of security and protection. This chapter builds upon the conclusions of chapter 2 and aims to explore some of the forms of organizing this discourse. To understand and explore the meanings and effects of ‘responsibility’ within R2P I turn to *irresponsibility*. For Derrida, as Jack M. Balkin proposes, “we discover that each legal concept is actually a privileging in disguise, of one concept over

⁵⁰⁴ Chris Brown. (2001). Moral Agency and International Society: Reflections on Norms, the UN, the Gulf War and the Kosovo Campaign, *Ethics and International Affairs* 15, No. 2, Carnegie Council on Ethics and International Affairs, pp. 87-98.

⁵⁰⁵ Martti Koskeniemi. (2011b). *The Politics of International Law*, Hart Publishing, p. 68.

another”.⁵⁰⁶ In this light it feels important to bring to light the history of suppression of the opposite or the other. According to Scott Veitch *irresponsibility* is the result of mechanisms that organise responsibility.⁵⁰⁷ In organizing responsible protection practices, sites of irresponsibility are produced and organized at the same time. Irresponsibility here is the other of responsibility. For Veitch, three main features play a key role in producing irresponsibility and are ‘*features of modern social forms of organization*’, with their ‘attendant mentalities’. These are: (1.) the division of labour and the significance of role responsibility, (2.) the meaning and effects of processes of individualization and (3.) the transference of responsibilities through the distinctions and combinations of social systems. I treat these ‘features’ as signifiers for ‘sites of irresponsibility’ within R2P and then I provide examples and work through the manner in which the disappearance of collective, political and moral responsibility become possible through these modes of social organization. In other words, this chapter aims to show the patterns of thinking that fabricate such sites within R2P and the attendant ‘mentalities’ of these three features of modern social organization, as manifested in the international setting and with regards to theorizing responsibility in international law and responding to mass atrocities.

One of the arguments of the chapter is that the extensive focus on individual accountability, blameworthiness or culpability evades the more important questions of structural, social and collective responsibility. Christine Schwöbel in *The Comfort of International Criminal Law* highlights the preference of professionals, politicians and the academic market in the certainty and ‘comfort’, which the discursive framework of international criminal law provides, against the ‘discomfort’ of international human rights law.⁵⁰⁸ As she explains, this

⁵⁰⁶ J. M Balkin. (1998). Deconstructive Practice and Legal Theory, in Scott Brewer. (eds.), *Evolution and Revolution in Theories of Legal Reasoning: Nineteenth Century through the Present*, Garland Publishing, pp. 1-44, p. 12.

⁵⁰⁷ Scott Veitch. (2007). *Law and Irresponsibility: On the legitimation of human suffering*, Routledge-Cavendish.

⁵⁰⁸ Christine Schwöbel. (2013). The Comfort of International Criminal Law, *Law and Critique*, Vol. 24, Issue 2, pp. 169-191, p. 169.

preference is grounded “on a contemporary desire for certainty over contention, action over discourse and simplicity over complexity...: in short, a preference of comfort over discomfort.”⁵⁰⁹ In the preference of comfort over discomfort something is lost. The notion of irresponsibility within R2P presents the possibility to highlight sites of exclusion and meanings that have been largely marginalized from the discourse around R2P and by standard arguments in support of military intervention for human protection purposes. In this sense, irresponsibility embodies the critique of responsibility. The recognition of ‘irresponsibility’ can also be seen as a site of discomfort: of “intellectual restlessness”.⁵¹⁰ If responsibility is irresponsibility and vice versa, what would be the effect if it were to enter our lexicons?

a. A notion of ‘irresponsibility’?

Attempts to formally define what responsibility means in international law often end in disagreement among legal professionals.⁵¹¹ As Jennifer Welsh said, responsibility “is one of the most powerful moral and legal terms in contemporary international politics.”⁵¹² Yet the dominant concern among legal and security professionals in relation to R2P is on the threshold criteria of R2P and whether there should be more expansion or narrowing of the criteria. In other words, mainstream literature around R2P, circles around the effective and strategic application of the norm. One can argue, within the legal literature, the notion of *responsibility as answerability* towards the ‘Other’ is undervalued, perhaps overshadowed by ‘calls to action.’ Furthermore, the discourse around humanitarian intervention and R2P gives added emphasis to the question of *action or inaction*. As such, analysis of the responsibility to protect concept “adopts a particular temporal focus” (i.e. on the effective and strategic application of R2P) and fails to account for the actual effects and meanings of humanitarian

⁵⁰⁹ *Ibid.*

⁵¹⁰ Schöwbel, *op cit.*

⁵¹¹ Nina H.B Jorgensen. (2000). *International State Responsibility*, Oxford Monographs in International law, Oxford University Press.

⁵¹² Jennifer M. Welsh and Maria Banda. (2010). International Law and R2P: Clarifying or expanding State’s responsibilities, *Global Responsibility to Protect*, Issue 2, pp. 213-231, p. 213.

intervention or to account for the role law plays in assigning and justifying such interventions.⁵¹³ The ‘international community’ already intervenes in those conflict-ridden countries and regions in varied ways. The question of responsibility of the ‘international community’ is much broader, persistent and complex than the temporary question of action or inaction in the face of man-made humanitarian catastrophes.⁵¹⁴ According to Orford:

“the focus is always on the moment when military intervention is the only remaining credible foreign option... The assertion that this is the only moment which can be considered renders it impossible to analyse any other involvement of the international community or to think reflexively about law’s role in producing the meaning of intervention.”⁵¹⁵

The ‘truth’ claims of the responsibility to protect are multiple: for fighting ‘evil’, ‘ending impunity’, ‘maintaining peace and security’, ‘protecting populations’, halting ‘large scale loss of life’. These are not temporal claims, even if they are momentarily reinvigorated to enable international ‘consensus’ and ‘action’. I begin to explore the question of international responsibility with one acknowledgment: I view claims to security and protection not as temporal but as persistent elements of the rhetoric and language of political authority and in this case, of global governance.

The issue of accounting for large-scale harms, such as mass human atrocities, has largely been preoccupied by the cognitive and discomfiting philosophical dichotomy between ‘answerability’ and ‘culpability’. Rather than limiting our horizon within a particular understanding of responsibility as ‘blameworthiness’, it makes sense to discuss R2P as a structure of answerability. The notion of irresponsibility pushes us to see ‘responsibility’ more broadly as a political concept and not only strictly as legal accountability. As Veitch suggests:

“responsibility needs to be understood as a term covering a range of different techniques and purposes, the appearance of which in different social institutions and conditions and locations is thus better thought of in the plural, as ‘responsibility practices’.”⁵¹⁶

⁵¹³ Orford, 2003, *op cit.*, p. 18

⁵¹⁴ *Ibid.*, p. 17.

⁵¹⁵ *Ibid.*, p. 18.

⁵¹⁶ Veitch, *op cit.*, p. 37.

This understanding involves recognition of the ‘symbiotic’ or the co-constitutive relationships between law, ethics (or morality) and social institutions. Legal or juridical ‘responsibility practices’ influence morality and politics, and in some ways moral or political ‘responsibility practices’ influence the meaning and effect of legal responsibility. The responsibility to protect concept can be regarded as one such ‘responsibility practice’, with its own specific context of emergence and distinctive features of agency or identity. Yet, it is tied up normatively with the discourse of the broader liberal juridico-moral concept of responsibility. This does not suggest a single notion of ‘responsibility’, “a timeless analytical concept”⁵¹⁷ which we can pinpoint. Rather, that certain forms and practices of ‘responsibility’ dominated legal and moral theory which frame more or less the normative framework of the ‘responsibility to protect’ concept.

Citing Alasdair MacIntyre, Veitch explains, that there are no ‘primordial’ moral responses or commitments, ‘separable from social systems’. Instead, there is a “mutually constitutive relation between moral philosophies (and hence by extension, moralities themselves) and the empirical conditions within which they exist or which they seek to bring about.”⁵¹⁸ The significant point here is that we should perhaps think of ‘responsibility’ within the responsibility to protect as a ‘normative device’ and/or a ‘discursive framework’; within and through which international political authority responds to mass atrocities and regulates the use of military force for protection. Furthermore, it can be argued that ‘responsibility practices’ as moral claims of particular historico-juridical orders appear as processes, in this sense, they are not fixed practices but dynamic. The dynamic and rhetorical component of ‘responsibility practices’ can also make them prone to manipulation and management. As techniques of governance, ‘responsibility practices’ can *dominate discourses and normalize moral behaviour*. According to Veitch: “it is only by treating ‘responsibility practices’ as part of ‘power practices’ that we would be able to understand their actual roles for what they are.”⁵¹⁹ In

⁵¹⁷ *Ibid.*, p. 38, citing Nicola Lacey. (2001). Responsibility and Modernity in Criminal Law, *Journal of Political Philosophy*, Volume 9, Number 3, 249-276.

⁵¹⁸ *Ibid.*, p. 40, Alasdair MacIntyre. (1985). *After Virtue: a study in moral theory*, third edition, Bloomsbury.

⁵¹⁹ *Ibid.*, p. 41.

this light, R2P should also be treated as a power practice. This was also one of the claims of chapter 2. In order to read the responsibility to protect as just war theory, one should treat the concept as a power practice. The responsibility to protect concept, as an ethico-political claim and power practice reflects the international community's framework of the use of violence. It is by treating the 'responsibility' within the responsibility to protect as a rhetorical technique that we can begin to articulate the broader moral and political edge of the concept. Therefore, we should take note Veitch's primary proposition regarding the relation between individual subjectivity on one hand and the various systemic forms that produce meaning in which the individual finds oneself on the other. According to Veitch:

"The modern fixation with responsibility, freedom, intention and liability devolves on human relations as encountered through individual understandings and responses, but only as these are the mediated products of the totality of modernity's institutional and disciplinary mechanism."⁵²⁰

A primary insight we gain from Veitch's statement, is that to inquire broadly on 'responsibility', we need firstly to understand morality as a social product. This product, as Zygmunt Bauman suggests, can be perceived further as the imposition of society's:

"own substantive version of moral behaviour; and concurs with the practice in which social authority claims the monopoly of moral judgement. It tacitly accepts the theoretical illegitimacy of all judgements that are not grounded in the exercise of such a monopoly; so that for all practical intents and purposes moral behaviour becomes synonymous with social conformity and obedience to the norms observed by the majority."⁵²¹

In this sense, responsibility practices as power practices can also be seen as part of the cultural hegemony of law, as discussed in chapter 2, and understood as practices of naturalization and rationalization. It is by treating morality as a product that we come to understand 'responsibility practices' as techniques of governance.

Veitch's main proposal in *Law and Irresponsibility* is that "legal mechanisms operate as much to deflect responsibility suffered as they do to instantiate it... in

⁵²⁰ Veitch, *op cit.*, p. 56.

⁵²¹ Bauman, *op cit.*, p. 175.

many instances, legal mechanisms in fact play a key role in organising irresponsibility and that they do this as they determine responsibility.”⁵²² This is based on the proposition of an ‘irresponsible mentality’:

“through all of the varied concepts and categories, distinctions, systems, institutions and disciplines in which the modern individual exists and operates can be found the modern tools for disconnecting effect and cause, liability and suffering, murder and death.”⁵²³

Due to the varied ‘disaggregation of responsibility’ that takes place, which disconnects harm from cause, great suffering occurs which apparently no one accounts for or responsibility does not materialise as promised. Furthermore, the greater the suffering, says Veitch, the less responsibility is established for it. This causes ‘asymmetry’ between suffering and establishing responsibility for it. In contrast to a conventional understanding of law and of legal institutions as organising responsibility, Veitch suggests, through a series of cases how normal and legalized structures and practices are implicated in the production of large-scale harms and thus organising ‘irresponsibility’. For Veitch, ‘irresponsibility’ is “a disregard for consequences in the name of upholding the law”.⁵²⁴ In other words, in the course of discharging a legal ‘responsibility’ or obligation, one can also enter ‘a zone of *non-responsibility*’.⁵²⁵ In this sense, irresponsibility appears as the necessary ‘other’ of responsibility. As Veitch suggests: “to an increasing degree, the juridical form permeates, structures, and organises the available range of normative understandings, expectations and responses in the wider society.”⁵²⁶ Because the ‘juridical form’ presupposes a claim to correctness it can also foreclose the possibility of responsibility. Veitch investigates the continuing harms and suffering associated with the ‘amnesia’ of colonial history, the inability of the law to rule out a nuclear holocaust and an environmental large-scale destruction by way of examining the *Nuclear Weapons* case and the UN sanctions regime imposed on Iraq in the 1990s.⁵²⁷ By way of analogy with regards to the responsibility to protect concept I am interested in the ways in which

⁵²² Veitch., *op cit.*, p. 7.

⁵²³ *Ibid.*, p. 59.

⁵²⁴ *Ibid.*, p. 21.

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*, p. 26.

⁵²⁷ *Ibid.*

responsibility is dispersed and disavowed through and within the responsibility to protect concept. For example, the ambivalence between individual and collective responsibility in international criminal law serves as an example of how is it that international 'legal mechanisms' can produce under normal working conditions sites of 'irresponsibility', while at the same time professing responsibility. This is the particular irony of the responsibility to protect concept, that in the name of its promised responsibility, we can expose its sites of irresponsibility. The reference and analysis of some aspects of post-war reconstruction in Iraq and judicial complementarity in Libya facilitate the same argument. The intention here is to see past culpability, in an attempt to open up to the broader concept of 'responsibility' as 'answerability', and to understand the varied meanings of the moral claim of security and protection within the responsibility to protect concept.

Sites of 'irresponsibility' occur "in particular through the compartmentalization, demarcation and limiting of responsibilities within and selectively across specific institutional settings."⁵²⁸ This results in the disappearance of responsibility. Veitch posits that three main features play a key role in producing irresponsibility. These are not limited to the juridical form but are features of '*modern social forms of organisation*' including their '*attendant mentalities*'.⁵²⁹ These features influence the way we think about our responsibilities and organize communal life. According to Veitch, these are: (1.) the division of labour and the significance of role responsibility; (2.) the meaning and effects of processes of individualisation and (3.) the transference of responsibilities through the distinctions and combinations of social systems.⁵³⁰ On the latter feature, Veitch turns his attention to the relation between the economic and the political system and how, by treating these systems as different ontological universes, results in 'forms of responsibility transference', through which causes and harms become detached so that great suffering does not register as such. As he notes, this

⁵²⁸ *Ibid.*, p. 41.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

‘transference of responsibility’ arises also within the juridical field itself, as a result of the ‘compartmentalization’ of responsibility in distinct legal responsibilities and under different legal fields. I hope to demonstrate how *elements* of these interrelated forms of social organization influence the disappearance of collective, political and moral responsibility in response to mass crimes under the protection practices of legal cosmopolitanism and liberal international law. I treat legal and political responsibility as two different forms. Legal individual accountability can often overshadow the complexity and significance of structural and collective responsibility. The discussion that follows seeks to explore issues of agency. Overall, my hope is to explain how thinking about ‘irresponsibility’ helps us to understand ‘responsibility’ within the responsibility to protect.

b. Agential materiality and the ‘international community’: ruling the ‘void’ and mastering uncertainty

Tony Blair delivered two separate speeches at the Chicago Economic Club – one in 1999 as British Prime Minister at the height of the crisis in Kosovo, and one ten years later, in 2009, focusing on the issue of terrorism. The *‘doctrine of the international community’* - the title of both speeches - manifests for Blair through commitments on a shared policy. In his 2009 speech, Blair sought to extend on what the ‘international community’ shares and is committed to. Blair advocated enthusiastically for an interventionist ethic of military humanism. This is what the ‘doctrine of the international community’ is. According to Blair, “our job is simple: it is to support and partner those Muslims who believe deeply in Islam but also those who believe in peaceful coexistence, in taking on and defeating the extremists who don’t.”⁵³¹ Initially, there is a sense of hesitation in a simplistic articulation that sees the political role of Islam as the primary setback in securing peaceful coexistence. Furthermore, it is also, at best, unclear how Blair’s militarist humanism can provide an end to such conflict by distinguishing ‘good’ or

⁵³¹ Tony Blair. (2009). *Doctrine of the International Community: 10 years later*, *Yale Journal of International Affairs*, Perspectives, Vol. 4, Issue 2, pp. 5-14.

‘peaceful’ from ‘bad’ Muslims. I will return to these issues and claims further in the thesis. Nevertheless, in Blair’s speech, the responsibility of the ‘international community’ is discharged through *commitment* on the ‘war on terrorism’ and to the interventionist ethic. The members of the Chicago Economic Club are CEO’s of global corporations, managing partners in leading law, accounting and consulting firms, executives of top technology, financial, healthcare and insurance and media companies, the leaders of Chicago’s major cultural and educational institutions, and the heads of local and charitable foundations and civic organizations. Such an ‘international community’ is far from specific. However, what is suggested is that the opinion of these bodies on foreign policy planning mattered for Blair, or perhaps for any head of state.

Kofi Annan in *The meaning of the international community*, also in 1999, described what the international community is by reference to a moment of decision, albeit a temporal one, of a ‘coming together’.⁵³² Annan indicates that what binds the international community is a vision of a better world. According to Annan, the international community is a ‘work in progress’. It is manifested in its calls for action or in its failures to attend to crises. It is also evident in its constitutional moments such as the creation of the International Criminal Court. The ‘international community’ seems to be not something we can pinpoint but a pool of agents and networks in constant change and motion.

Both speeches reveal an implied intention to define what the ‘international community’ means. Further, they show an intention to designate agency and to assign distinctive features of identity to the ‘international community’ according to one’s political vision. In Blair’s speech the ‘international community’ precisely *becomes* a community through the audience to which its doctrine is being articulated and part of its identity is given to it through the military interventionist ethic he proposes in response to terrorism. Similarly, Annan

⁵³² Kofi Annan. (1999, September 15). Secretary General examines the ‘meaning of international community’ in address to IDP/NGO conference, Press Release SG/SM/7133/PI/1176, Retrieved from un.org.

designates agency and identity through his 'vision' of a 'coming together' and of progress. The 'international community' is in this respect a non-homogenous and elusive entity whose agency is assumed through the course of both speeches. A difference however can also be established. Blair not only assigns agency but delimits identity. His interventionist ethic of military humanism provides a specific content through which those agencies are to carry out the dream of peaceful coexistence. In Annan's speech, meaning and identity hides behind 'consensus' and global institutions of governance. The content of this vision makes Annan's 'international community' much more elusive and mysterious than Blair's. The use of Blair's and Annan's speeches here suggests an initial 'performative' dynamic inherent in articulations of the 'international community', to which I will return in detail in chapter 4.

The dream of a better world, of a coming together, this fantasy of a bright future ad infinitum for international law and for humanity, does play an important role for Annan. Martii Koskenniemi calls this vision of the 'emerging' better world 'messianic'.⁵³³ For Koskenniemi, drawing upon Tom Franck's *The emerging right of democratic governance*,⁵³⁴ the messianic vision identifies what it is by what is yet to be. It is rooted in a future. This future is however both certain and predictable. For Franck it emerges through democratic governance. According to Koskenniemi, Franck's subject of rights is a coherent autonomous individual who identifies itself through a particular (national or ethnic) community, but also shares something with the universal communion of the cosmopolis.⁵³⁵ This subject has an international coherent self that waits to be realized through and within democratic peace.⁵³⁶ This narrative is shattered, says Koskenniemi, when the individual does not share or cannot identify with what the universal shows to

⁵³³ Martii Koskenniemi. (2003a). Legal Cosmopolitanism: Tom Franck's Messianic World, *New York University Journal of International Law and Politics*, Vol. 35, pp. 471- 486.

⁵³⁴ Thomas Franck. (1992). The Emerging Right to Democratic Governance, *American Journal of International Law*, Vol. 86, Issue 1, p. 47, Franck is arguing for an emerging norm of democratic entitlement in international law, which requires that states receive governmental legitimacy on grounds of democratic identity.

⁵³⁵ Koskenniemi, 2003a, *op cit.*, p. 479.

⁵³⁶ G. John Ikenberry and Anne Marie Slaughter. (2006). *Final report: Forging a world of liberty under law, U.S National Security in the 21st Century*, Woodrow Wilson school of public and international affairs, Princeton University.

be.⁵³⁷ This in part explains the ‘fall and rise of international law’.⁵³⁸ When individuals cannot identify with the promised materialization of the universal cosmopolis of present international law, international law ‘falls’. On the contrary, when there is identification with what international law promises of being, international law ‘rises’ again. According to Koskeniemi, “the great narrative [and fear] of cosmopolitanism is that its cosmopolitanism will show itself to be false – a façade for particular interests. This was Rousseau’s critique of Grotius, Hegel’s critique of Kant and Morgenthau’s critique of liberalism.”⁵³⁹ Further, the calls to ‘a better vision’ or ‘emergence’ avoid comprehensive critique of the present because what is coming has not yet arrived. In another sense, the present materialization of international law and its violence, struggle and diversity are not taken seriously since the Kantian cosmopolitan ‘dream’ of global security has not yet arrived but is nevertheless already ‘on the way’. One can argue, the call to ‘a better future’ appears as a method of managing the uncertainty and struggle of the ‘political’ through a partial disregard of the political present.⁵⁴⁰ Here, Derrida’s distinction between *venir* (future) and *a-venir* (“to-come”) is useful in maintaining a difference between a calculated, in a sense, programmed future, and a future as unpredictable and as an indefinite process.⁵⁴¹

There is a close relationship between Franck’s legal cosmopolitanism, Walzer’s ethics as explained in the last chapter, and the ways in which their distinct but related cosmopolitanisms avoid to realize the foundational violence of liberal international law. Further, as the first legal professionals of the *Institut de droit* also believed, this insistence on an emergent brighter future should not remain only a spirit: it should become normative.⁵⁴² Those expansive universal rights and responsibilities should be codified and be given form. Furthermore, Franck’s legal cosmopolitanism, Walzer’s communitarian beings and their attendant visions

⁵³⁷ Koskeniemi, 2003a, *op cit.*, p. 481.

⁵³⁸ Martii Koskeniemi. (2001). *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960*, Cambridge University Press, Introduction.

⁵³⁹ Koskeniemi, 2003a, *op cit.*, p. 486.

⁵⁴⁰ Carl Schmitt. (2007). *The Concept of the Political*, University of Chicago Press.

⁵⁴¹ Jacques Derrida. (2005). *Rogues: Two Essays on Reason*, Trans. Pascale-Anne Brault and Michael Naas, Stanford University Press.

⁵⁴² Martii Koskeniemi, 2001, *op cit.*

initially appear as unpolitical. As said by Koskeniemi, liberalism “claims to provide simply a framework *within* which substantive political choices can be made”.⁵⁴³ However, the discursive framework one uses to justify moral doctrines is precisely “materially controlling” the structure of international moral and legal argument, which in turn provides for “material consequences for international life.”⁵⁴⁴ “Modernity’s preference”, says Wendy Brown, “for favoring norms epistemologically over deciding them politically means that we are inclined to believe that the construction of normative frameworks can resolve political questions.”⁵⁴⁵

For Peter Fitzpatrick, the reference to ‘international community’ is a reference to a ‘deific presence’.⁵⁴⁶ The challenge that the ‘inter-national’ posits (the prefix ‘inter’ denoting that in between) is the realization of that ‘something’.⁵⁴⁷ According to Fitzpatrick: “if we cannot accept the abstracted completeness of the nation-state or the evasive transcendence of this ‘international community’ then we have to account for the coherence of international law in other terms.”⁵⁴⁸ In another sense, that ‘something’ is *demanded* in order to provide for the political authority of universal jurisdiction. The reference to an international community, or ‘inter’-national law itself then, is characterised by a ‘void’ for which there is great insistence that we name, frame and order in specific ways.⁵⁴⁹ The ecumenical character of international law needs always to move beyond the particular site of its emergence – beyond the jurisdictional law of the European sovereign states of the sixteenth century and past its spatial and historical ‘*nomos*’ in which each state ‘recognises’ another as a legal sovereign entity. The performativity of recognition is in this sense what made and perhaps makes

⁵⁴³ Koskeniemi, 2005, *op cit.*, introduction.

⁵⁴⁴ *Ibid.*, p. 5

⁵⁴⁵ Wendy Brown. (1995). *States of Injury: Power and Freedom in Late Modernity*, Princeton University Press, p. 47 in David Campbell, Why Fight: Humanitarianism, Principles and Post-structuralism, *Millenium: Journal of International Studies*, Vol 27, No.3, 1998, pp. 497-521, p. 501.

⁵⁴⁶ Peter Fitzpatrick. (2015). Ultimate plurality: international law and the possibility of resistance, *Inter Gentes: The McGill Journal of International law and Legal Pluralism*, 1 (1), pp. 3-22, see also Peter Fitzpatrick, (1992), *The Mythology of Modern Law*, Routledge London and New York.

⁵⁴⁷ *Ibid.*, p. 5.

⁵⁴⁸ *Ibid.*, pp. 4 to 5.

⁵⁴⁹ *Ibid.*, p. 8, the reference to the ‘void’ is made in Anthony Carty. (1997). Myths of International Legal Order: Past and Present, *Cambridge Review of International Affairs*, Vol. 10, Issue 2, pp. 3-22, p. 10.

‘international community’, or in fact, what is being materialized is a complex and political process, through and in which the international community realizes itself and its prospective responsibilities. Through this lens, the reference to the ‘international community’ entails a universalising and an inventive process. *The self-reference in the articulation of the ‘international community’ is an act of self-constitution.*⁵⁵⁰ To understand the ‘international community’ as an act of self-constitution is also to recognise that the ‘responsibility’, which it carries, is also an act of self-constitution. Whereas the ‘international community’ is something other than it was before, ‘responsibility’ also changes. For example, the ‘international community’ is not understood today as the ‘international community’ of the Cold War period. Whereas international institutions are thought to be ‘finally working’ in the post-Cold War period, the meaning of the ‘international community’ is defined as something other than what it was during the Cold War. Understood in this sense, both ‘international community’ and ‘responsibility’ open up to alternative and varied interpretations and meanings as many really as the spaces and sites in which they are manifested and realized. One of the main arguments of legal cosmopolitans, including the authors and supporters of R2P, is that in order to be useful and effective, rights and protections have to be delegated and managed through formal international political authority. Only then we can take action as ‘international community’. However, given the impossibility of universalisms, the inherent injustice of law and “the suffering that is produced by social normality”,⁵⁵¹ international law’s community never achieves concreteness. Instead, the reality of international law seems to be one of conflict, struggle and diversity. Legal cosmopolitanism cannot “on its own assumptions, consistently hold to its objective-formal character, [and]... have to resort to material principles which it will leave unjustified.”⁵⁵²

⁵⁵⁰ See also Costas Douzinas. (2006). Bare sovereignty, in Anne Orford, (ed.). *International Law and its Others*, Cambridge University Press.

⁵⁵¹ Martii Koskeniemi. (2002). ‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law, *The Modern Law Review*, Vol. 65, No. 2, pp. 159-175, p. 173.

⁵⁵² Koskeniemi, 2005, *op cit.*, p. 6.

Koskenniemi's work on *The Gentle Civilizer of Nations* is in part a narrative of modern international law as cultivated by the legal professionals of the later-nineteenth century onwards and towards the formalism of figures like Kelsen and Lauterpacht.⁵⁵³ It is an account of modern international law, which explains how these professionals wished to normatively codify universal principles akin to a global public law. According to Koskenniemi, the distinctive feature of this 'international sensibility' "was not only its reformist political bent but its conviction that international reform could be derived from deep insights about society, history, human nature or developmental laws of an international and institutional modernity."⁵⁵⁴ These men were the cosmopolitans (*'mouvement cosmopolite'*), they sought to delegate formal political authority to the international setting. These dreams, shattered by fascism, were to be reinstated at the end of WWII and subsequently at the end of the Cold War. The post-1945 alliance allowed for the realization of these dreams and the spread of liberal ethico-juridical ideas. 'Crimes against humanity' was one among other such universalising concepts. Since such concepts – 'humanity' or 'international community' – do not have a fixed agent or subject but are dynamic, what seems to define them is the historical context in and through which they are being realized. This determinate context is not fixed but signifies a set of circumstances one finds oneself within. At this point, what I want to highlight is a contradistinction. If moral concepts acquire meaning within a particular socio-historical and institutional context, then it makes sense to say that without such context, 'humanity' and 'responsibility', become trivial, partially empty and void of concrete meaning. Consequently, one can argue that without the 1945 alliance – that "bizarre alliance" as Eric Hobsbawm tells us – without the 'coming together', without the historical context which enabled institutional creation – the United Nations, its Charter and the signing of the Universal Declaration of Human Rights – such doctrines such as 'crimes against humanity' would be meaningless or immaterial. Koskenniemi posits, "whatever began at that time [*Institut de droit international*] came to an effective end sometime around 1960."

⁵⁵³ Koskenniemi, 2001, *op cit.*

⁵⁵⁴ *Ibid.*, introduction.

That ‘end’ saw the emergence “of a depoliticized legal pragmatism on the one hand, and in the colonization of the professional by the imperial policy agendas”.⁵⁵⁵ It would be interesting to explore the context and practices, which led to a depoliticised legal pragmatism but that would be beyond the scope of the chapter.

Legal cosmopolitans seek to materialize this process, to structure a coherent universal subject and demarcate that ‘in between’ of community. R2P is also part of this materialisation. It can be seen as a technique to ‘master’ the uncertainty and complexity of international political space and of subjectivity. And more particularly, it is an attempt to regulate the use of violence. According to Vivienne Jabri:

“cosmopolitanism is not simply a mode of being, nor is it merely a set of ethical ideals, but has come to be constituted by a set of institutionalized practices, promoted or actualized, that come to redefine and reconfigure the international as a juridical and political space.”⁵⁵⁶

As such, legal cosmopolitans who promote R2P demarcate and define not only what cosmopolitanism is and its possibilities but also the subject of responsibility, and in turn what responsibility means as performed by security institutions and their protection practices. In this light, one can argue, to the extent that cosmopolitan responsibility associates with the military humanism of R2P and the spread of liberal democracy, ‘responsibility’ within the responsibility to protect is defined and structurally constituted via the practice and rhetoric of ‘military humanism’. Following the insights gained from Chapter 2, to hide the punitive dimension of the responsibility to protect under the rubric of protection points out to a failure to come to terms with the precisely ‘complex’, ‘discomforting’, ‘contentious’ and ‘political’ dimensions of ‘responsibility’ towards the Other. In part, this thesis is about how a ‘notion of irresponsibility’ of the responsibility to protect helps to expose the normative framework of the concept

⁵⁵⁵ *Ibid*, in Chapters 5 and 6 Koskenniemi describes the ‘image’ of nineteenth and early twentieth century lawyers, for Koskenniemi the majority of these lawyers were centrists who tried to balance their nationalism with their liberal internationalism.

⁵⁵⁶ Vivienne Jabri. (2012). Cosmopolitan politics, security, political subjectivity, *European Journal of International Relations*, Vol. 18, Issue 4, 2012, pp. 625 – 644, p. 625 to 626.

of the ‘responsibility to protect’, which in turn attempts to manage political plurality and ignores the complexity and potentiality of individual and political subjectivity.

For Tony Erskine, to discharge responsibility requires agential materiality. Material agency, or in this sense cognitive agency, transfuses the ability to discharge responsibilities.⁵⁵⁷ Erskine has stated: “human individuals are generally thought to be paradigmatic moral agents”.⁵⁵⁸ Conversely: “reference to the ‘international community as a moral agent is deeply ambiguous” and further, “not only does the ‘international community’ as a moral agent lacks an identity that is independent of the identities of its constitutive members, but it does not have the decision-making capacity.”⁵⁵⁹ This pattern of thinking is associated with the idea of responsibility as accountability or blameworthiness. Legal responsibility requires such a strict identity on the part of the holder of responsibility because it necessitates a physical person or corporeal body with a specific structure of command to hold accountable for the failure of discharging responsibilities. As such, the UN or the UNSC can be seen as candidates of legal responsibility.⁵⁶⁰

It seems relevant to highlight here the “sharper dividing line between political (collective) responsibility, on one side, and moral and/or legal (personal) guilt, on the other.”⁵⁶¹ I am interested in the various ways *the focus on the individual* (and law as regulating the body and individual responsibility), *works as a place of comfort against the discomfort produced through collective and structural responsibilities associated with mass suffering*. To quote Hannah Arendt: “in the center of moral considerations of human conduct stands the self; in the center of

⁵⁵⁷ Toni Erskine. (2003). Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States, in Toni Erskine (eds.), *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*, Palgrave MacMillan, pp. 19-40.

⁵⁵⁸ *Ibid.*, p. 20.

⁵⁵⁹ *Ibid.*, p. 25.

⁵⁶⁰ Anthony F. Lang, Jr. (2003). The United Nations and the Fall of Srebrenica, in Toni Erskine, *op cit.*, pp. 183-203.

⁵⁶¹ Hannah Arendt. (2003). *Responsibility and Justice*, Edited by Jerome Kohn, Schocken Books, New York, p. 151.

political considerations of conduct stands the world.”⁵⁶² In crimes of a grand scale (for example, genocide or crimes against humanity) in which mass suffering occurs, legal (individual) accountability is not proportionate to the suffering cost and hence collective responsibility does not materialize. Someone can be relieved from legal responsibility but yet not from political or collective responsibility. Further, the difference between legal guilt and political responsibility does not mean that the legal and political spheres of responsibility are also distinct. In fact, legal guilt and moral responsibility in the face of mass crimes reveal an intimate relationship. In the face of mass crimes, the way we deal with legal guilt for mass crimes, influences and is influenced by our understanding of political (collective) responsibility. Arendt has famously claimed the distinctive nature of legal responsibility: “where all are guilty, nobody is. Guilt, unlike responsibility, always singles out; it is strictly personal”.⁵⁶³ This is also perhaps the basis of Erskine’s claim, that collectivities such as the ‘international community’ do not have identity and decision-making capacity. Arendt elsewhere says: “it is the grandeur of court proceedings that even a cog can become a person again.”⁵⁶⁴ Note here the primary paradoxical relationship between social responsibility and legal responsibility. Conversely, on political or moral responsibility Arendt has said:

“This vicarious responsibility for things we have not done, this taking upon ourselves the consequences for things we are entirely innocent of, is the price we pay for the fact that we live ourselves but among our fellow men, and that the faculty of action par excellence, can be actualized in one of the manifold forms of human community.”⁵⁶⁵

This suggests that political and moral responsibility is much more complex than legal accountability or legal guilt, and that perhaps to prison oneself within the confines of legal responsibility is a failure to recognise collective responsibility emanating from the very fact of human co-existence and experience. Or, by focusing on legal responsibility or individual accountability something is lost. According to Erskine, “policy prescriptions that place duties with collectivities that do not meet the criteria for institutional moral agency - such as the

⁵⁶² *Ibid.*, p. 153.

⁵⁶³ *Ibid.*, p. 147.

⁵⁶⁴ *Ibid.*, p. 148.

⁵⁶⁵ *Ibid.*, p. 158.

‘international community’ – are not only fruitless endeavours, but they also risk being evasions of significant problems veiled as ‘calls to actions.’”⁵⁶⁶ Erskine suggests that some institutions, for example states but not nations, qualify as institutional moral agents.⁵⁶⁷ Yet, responsibility does not only emerge vertically, it also has a horizontal dimension. Erskine’s evaluation is a legal one, it presupposes a particular subject of responsibility and/or a structure of command that can then be connected to a specific action (or omission) for which it can be held accountable and thus be punishable. Given the agential void of the ‘international community’, the political, social and collective ‘responsibility’ which it promises, fails to materialize. Over time, this non-materialization of responsibility becomes accumulated and what actually materializes is the understanding of a widespread, systematic and long-term suffering that no one is accountable for. In this sense, if the ‘international community’ has no identity and no agential materiality, how come we still think of ‘humanity’ as having responsibilities? Who assigns identities and duties on elusive collectivities like the ‘international community’ or ‘humanity’, and how? How do we assign political responsibility in bigger and wider networks, multi-structural and with multiple sites of action? Where a single structure of command cannot be identified, as legal reasoning necessitates, would that mean that materialising and actualising political responsibility for such wide networks is impossible?

c. Sites of ‘irresponsibility’ within R2P

The intention here is to uncover and expose ‘sites of irresponsibility’ within R2P. Since the responsibility to protect is a legal concept that assigns responsibility to the state and the ‘international community’, the following analysis seeks to investigate patterns and forms of the disappearance of political, moral and collective responsibility within the responsibility to protect concept. In other words, the intention here is to see how law and legal responsibilities organize irresponsibility in relation to the responsibility to protect concept. To explore

⁵⁶⁶ Erskine, *op cit.*, p. 26.

⁵⁶⁷ *Ibid.*, p. 27.

this, I use as signifiers Veitch's three main features of modern social forms of organization to which I referred above, and their relation to the production of sites of irresponsibility.

The division of labour and the significance of role responsibility

In *Modernity and the Holocaust*, Bauman demonstrated how modern civilisation aiming at social order, and specifically Western civilization, allowed for or even socially engineered the horror of the Holocaust. The modern management of morality, Bauman suggests, has furthermore the characteristics of (1.) the social production of distance; (2.) the substitution of moral responsibility, which effectively conceives the moral significance of action and (3.) the technology of segregation and separation.⁵⁶⁸ In other words the assumption is that evil and the mass human atrocities of WWII were not the product of disorder or social chaos, but rather of the "terrifying normality" of "the modern – rational, planned, scientifically informed, expert, efficiently managed, co-ordinated way".⁵⁶⁹ Arendt has famously called the effect of top-down and socially engineered violence the 'banality of evil'.⁵⁷⁰ The well-known portrayal of Adolph Eichmann through Hannah Arendt's narration of his trial in Jerusalem is an attack against the understanding that individuals can single-handedly perpetrate crimes against humanity.⁵⁷¹ It is the story of an ordinary man, devoid of his critical capacity, following the law and assisting order. It is also an attack against the trials themselves for their failure to grasp the global dimension and effects of 'crimes against humanity'. Veitch's notion of irresponsibility stems from a very similar central thesis. It aims to show the process of 'legally caused harms', "not as impotence, but as the system *working*".⁵⁷²

⁵⁶⁸ *Ibid.*, p. 196.

⁵⁶⁹ Bauman, *op cit.*, p. 89.

⁵⁷⁰ Hannah Arendt. (2005). *Eichmann and the Holocaust*, Penguin Book, first published in 1963.

⁵⁷¹ Arendt, 2005, *op cit.*

⁵⁷² Veitch., *op cit.*, p. 95.

The elements of the mechanisms of the inner-societal productions of order: standing armies, police forces, financial and welfare institutions, those bureaucratic institutions which provide for order and security - are also elements of communal identity and reality; they are producing, internalizing and institutionalising particular understandings of responsibility. Bauman claimed that one form of responsibility that we can recognize is a technical one rather than moral and is endogenous of the hierarchical and functional divisions of labour.⁵⁷³ In other words, this understanding of responsibility – role responsibility or command responsibility - emanates from processes produced by the division of labour. One of its central characteristics is the “disassociation from moral evaluation of ends”.⁵⁷⁴ Functional, technical and command responsibility is associated with one fulfilling a duty, taking a decision under a specific role, or commanding subordinates, rather than thinking over the consequences of the “final outcome of collective activity, and the outcome itself”.⁵⁷⁵ Contrary to Toni Erskine, Bauman submits that role responsibility is “a condition in which he [the actor] sees himself as carrying out another person’s wishes”; the “agentic state is the opposite of the state of autonomy.”⁵⁷⁶ Bauman calls this responsibility ‘*free-floating*’, in that it is ‘unanchored’.⁵⁷⁷ Responsibility is in this sense prescribed by one’s role. Hannah Arendt has drawn particular attention to this kind of responsibility referring to it as the ‘cog-theory’.⁵⁷⁸ A further feature of role responsibility is that it minimizes ‘human proximity’ between one’s experience and the outcome of collective actions or roles producing suffering to the other. According to Bauman, “morality seems to conform to the law of optical perspective.”⁵⁷⁹ Role responsibility is closely related to legal responsibility. What is important here, as Veitch suggests, is that the legal form is the mediating form.⁵⁸⁰ In effect, law *organizes* various role responsibilities into legal role

⁵⁷³ Bauman, *op cit.*, p. 97 and 98.

⁵⁷⁴ *Ibid.*, p. 98.

⁵⁷⁵ Bauman, *op cit.*, p. 97.

⁵⁷⁶ *Ibid.*, p. 163.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ Arendt, 2003, *op cit.*, p. 29.

⁵⁷⁹ Bauman, *op cit.*, p. 192 and in p. 154, Milgram’s experiment suggested that “inhumanity is a matter of social relationships.”

⁵⁸⁰ Veitch, *op cit.*, p. 81.

responsibilities. It establishes the boundaries of causation and defines what amounts to harm. It also defines the boundaries of thinking about responsibility itself within an activity. Other considerations, alternative considerations or further considerations of responsibility and of harm within an activity or practice stop where legal responsibility indicates. Whereas suffering occurs through the fulfilment of legal responsibility, suffering does not “register in law as problematic precisely because it was legal.”⁵⁸¹ In this light, law cannot reflect on its ‘irresponsibility’; *it is blind to the suffering that it produces*. In organising legal role responsibilities, law also *normalizes* the political claims within an activity. While a demand of responsibility arises, law has already established the framework, criteria, claimants, harms and forms of redress under which that demand of responsibility is to be fulfilled. According to Veitch, “the legal form is seen to be desirable not because of its substantive rationality, but because of its instrumental deployment – the difference it can effect on the reality as a means of providing authoritative verdicts.”⁵⁸² Through this lens, legal role responsibility squeezes out the complexity of political conflicts and of responsibility in order to make them manageable. It provides a system for the management of political conflicts. Nowhere is this more evident than in international law. International law is in effect a system that seeks to regulate competing political claims between states.

The story of Francis M. Deng, the ‘father’ of sovereignty as responsibility and once passionate advocate of the concept and language of the responsibility to protect, illustrates the issue of role responsibility. Mading Deng, a South Sudanese diplomat, worked within the United Nations for more than 30 years. In 1992, he was appointed by then UN Secretary General Boutros-Ghali as Representative of the UN for Internally Displaced Persons (IDPs). He held this position for 12 years. In the course of his post he made multiple scholarly contributions including, in 1996, the co-authorship of *Sovereignty as*

⁵⁸¹ *Ibid.*, p. 91.

⁵⁸² *Ibid.*, p. 83.

Responsibility: Conflict Management in Africa.⁵⁸³ This study has served as the conceptual underpinning of the responsibility to protect concept. The publication underscores the responsibility of the state to account for mass crimes or human violations committed in its territory to the ‘international community’. It underlines the belief that often the invocation of national sovereignty blocks the “international community from providing protection and assistance to the needy and helping in the search for an end to destructive violence”.⁵⁸⁴ ‘Sovereignty as responsibility’ provided for a re-articulation of state sovereignty; not merely that state sovereignty is not a *carte blanche* but much more importantly, through the concept, ‘international’ protection pierces the thick armour of the state. The research suggests that internal conflicts in Africa illustrate the complexity of conflicts “rooted in the politics of identity and competition for power and scarce resource, which often clash with the demands of nation building”.⁵⁸⁵ Further, it acknowledged the devastating effects of the power vacuums produced at the end of centralized colonial government and the end of Cold War ethnic and national bi-polarization respectively.⁵⁸⁶ The project reflected and provided for various policies of integration and managing of conflict identities. It attempted to analyse the roots of violence in different African nations by expanding on issues within governance, the conflict of identities, financial conflicts and regional dynamics and international actors. It further concluded on the ambivalent role of regional and international actors, often positively creating a balance between competing claims and often aggravating claims to power. Yet, “a government that allows its citizens to suffer in a vacuum of responsibility for moral leadership cannot claim sovereignty in an effort to keep the outside world from stepping in to offer protection and assistance.”⁵⁸⁷ Such responsibility is conceived as *action*, it advocates that the international community must find the means and consensus to intervene even if

⁵⁸³ Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I. William Zartman, (eds.) *Sovereignty as Responsibility: Conflict Management in Africa*, 1996, The Brookings Institution, Washington D.C.

⁵⁸⁴ *Ibid.*, p. 1.

⁵⁸⁵ *Ibid.*, p. 19.

⁵⁸⁶ *Ibid.*, p. 21.

⁵⁸⁷ *Ibid.*, p. 33.

this is often poses serious risks or creates more conflict. In his role as researcher and Representative of the UN for IDPs, Francis Deng passionately advocated and worked to establish the position that state authorities should cooperate openly with international actors and abide by the rules governing the regime of human rights. In 2007 he was also appointed as the new Special Advisor for the prevention of Genocide and Mass atrocities. However, from 2012 up until July 2016, Deng served as the UN ambassador of the newly independent South Sudan.

In December 2013 violent conflict erupted between the Nuer and Dinka ethnicities and between the government and revolutionary armed opposition. The government was accused of atrocities in Juba, the capital of South Sudan and for expelling UN human rights ambassadors and aid workers. Deng, in his role as the South Sudanese representative, stood by his government and attempted to mediate the situation between his government and the UN. According to a *Foreign Policy* analysis, Deng preferred to ‘downplay’ the prospects of military intervention and attempted to mediate ‘behind the scenes’.⁵⁸⁸ In a United Nations Security Council resolution meeting in October 2015 on the provisions of extending UNMISS, the peacekeeping mission in S. Sudan, Francis Deng contested the view of the UNSC and the head of UNMISS, who proposed the use of drones (UAVs) for the purposes of investigating human rights violations, monitoring the ceasefire agreements and aid delivery. The resolution also included the threat of sanctions.⁵⁸⁹ Speaking after the vote, Deng claimed that the resolution was adopted without consultation with his Government. More specifically he said: “It is particularly regretful that issues on which the South Sudan Government had made its position clear have been adopted without regard to the Government’s point of view”.⁵⁹⁰ He claimed that the complete deployment of UNMISS personnel to the authorized military and police strength, including tactical military helicopters and UAVs, were “contested issues with the Government” and “to include them without consultation with the Government

⁵⁸⁸ Colum Lynch. (2014, July 14). Responsibility to Protect the Bad Guys, *Foreign Policy*, Retrieved from foreignpolicy.com.

⁵⁸⁹ United Nations Press Release, SC/12073, Retrieved from un.org.

⁵⁹⁰ *Ibid*, read statements after action.

was to invite controversy and potential disagreement and hostility.”⁵⁹¹ He said his Government

“needed assistance in such areas of building peace, building governance capacity and delivering essential services, among other things. It was time for the United Nations and the international community to engage the Government on this constructive agenda *instead of using negative threats of sanctions and punishment.*”⁵⁹²

What is noteworthy is that Deng, who worked in the corridors of the UN and held high profile positions such as the Special Advisor on Genocide, regarded the language used in the resolution, the established practice of sanctions, and the use of UAVs for the purposes of monitoring as ‘negative threats’ and ‘punishment’. Therefore, for Deng as representative of S. Sudan, the ‘international community’ was not assisting the country in implementing its responsibility but hindering both their relations and progress. The language used in the resolution and proposed protection practices were established UN practices, of which Deng was well aware and of which he himself made use in the past as representative of the UN.

The example of Deng’s case serves to illustrate the practical effects of role responsibility that is associated more with one fulfilling a duty rather than thinking reflexively about collective responsibility. Further, the example does not want to suggest that Deng should have accepted the resolution or that he was wrong, but only to underline the superficiality and rhetoric of the responsibility to protect concept and the complexity of responsibility for the other’s suffering under the very real and practical effects of the division of labour and of role responsibility. It is in this sense perhaps that responsibility is ‘free-floating’ according to Bauman, in that it is anchored in role responsibilities but ‘free floats’ between the different and distinctive roles. Responsibility, in this sense, fails to be discharged when one stops being reflective of the outcome of collective action. Military responsibility or command responsibility is paradigmatically such a responsibility, where responsibility floats up and down the hierarchy of command.

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*

The meaning and effect of processes of individualization within R2P

The western concept of responsibility, which we can locate within international law and just war theory, has a Hebrew-Christian pedigree. Arendt suggests that “with the rise of Christianity, the emphasis shifted entirely from care for the world and the duties connected with it, to care for the soul and its salvation.”⁵⁹³ From Nicomachean Ethics to Cicero, says Arendt, “ethics or morals were part of politics... The question is never whether an individual is good but whether his conduct is good for the world he lives in. In the center of interest is the world and not the self.”⁵⁹⁴ The modern concept of responsibility is associated with a subject that filtrates its morality through an emphasis on the conditions of the self, as if it is an autonomous and self-coherent subject. This is also in part the legacy of the Enlightenment. In the words of Veitch, “conceptions of autonomy and free will as the central understanding of responsibility, were to dominate the modern cognitive imagination.”⁵⁹⁵ In this sense the locus of responsibility as Arendt notes, is the self.⁵⁹⁶ According to Veitch, “responsibility, focally conceived of as individual responsibility, emerged as part of a long historical process, one that saw the rise of the autonomous ‘individual’ freed from the bonds of feudalism, fate and superstition.”⁵⁹⁷ Today, even if responsibility represents no single notion and even if we can recognize multiple ‘technologies of responsibility’, as Veitch suggests, the notion of individual responsibility in fact retains a particularly dominant place. Individualization seems to play a very important role in the production of irresponsibility. Indeed, exposing this feature brings to light a much deeper difficulty – that of the appearance of self, the Other, as well as collective being, and how these appearances materialize in law and politics.

Iris Marion Young in *Responsibility for Justice* argues that individual accountability and its attendant ‘personal liability model’ dominates the

⁵⁹³ Arendt, 2003, *op cit.*, 152.

⁵⁹⁴ *Ibid.*, p. 150.

⁵⁹⁵ Veitch, *op cit.*, p. 35.

⁵⁹⁶ *Ibid.*, p. 35.

⁵⁹⁷ *Ibid.*, p. 35, as a distinct term of inquiry, ‘responsibility’ emerges fully only post-enlightenment.

normative framework of analysis on the causes and roots of poverty.⁵⁹⁸ According to Young, “the discourse on personal responsibility... assumes a misleading ideal that each person can be independent of others and internalize the costs of their actions. It ignores how institutional relations in which we act render us deeply interdependent.”⁵⁹⁹ Young argues that “the personal liability discourse attempts to isolate the deviant poor and render them particularly blameworthy of their condition which then justifies the application of paternalistic or punitive policies to them.”⁶⁰⁰ Now, according to Veitch, citing Ulrich Beck, the paradox of post-modern individualization is that the same time the individual “sinks into insignificance, he or she is elevated to the apparent throne of world-shaper.”⁶⁰¹ More specifically:

“Where the individual is an *outcome* – of complex and contradictory systemic demands and stakes – then the attribution of freedom, responsibility, capacity, etc. to the individual is inevitably bound up with an understanding of these demands and stakes. And to the extent that these systemic forms are able to shift around meanings of responsibility and hence to produced zones of non-responsibility..., then the notion of the individual likewise embodies these characteristics – and not only superficially, but at its core.”⁶⁰²

In its extreme, this self “which has no necessary social content and no necessary social identity can then be anything, can assume any role or take any point of view because it is in and for itself nothing.”⁶⁰³ In the best case scenario the post-modern thinking subject appears to be divided between the various notions and demands of responsibility, which appear more and more as a discomforting feeling of the ‘morally obscene sight’ of the asymmetry between articulating responsibility and establishing responsibility.⁶⁰⁴ The individual emerges and is located within a globalized battlefield that is “dominated by complex organizations and the systemic dynamics in which they operate”, but at the same time it also appears to retain a prominent place when it comes to discharging

⁵⁹⁸ Iris Marion Young. (2011). *Responsibility for Justice*, Oxford University Press.

⁵⁹⁹ *Ibid.*, p. 4 to 5, see also an analysis of the ‘complexity theory’ and ‘vertical dimensions of state responsibility’ in international law in Mark Chinen. (2014). Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility, *European Journal of International Law*, Vol. 25, no. 3, pp. 703-732.

⁶⁰⁰ Young, *op cit.*, p. 20.

⁶⁰¹ Veitch, *op cit.*, p. 54.

⁶⁰² *Ibid.*, p. 55.

⁶⁰³ *Ibid.*, p. 56, citing Alastair McIntyre.

⁶⁰⁴ *Ibid.*, p. 93, the western moral system is based on sufferance: ‘the acknowledgement of suffering but the active toleration of its presence.

responsibility.⁶⁰⁵ Whereas suffering is the result of systemic contradictions and of complex networks, individual responsibility appears highly inadequate. The issue of individualization concerns the processes of individuation not only within oneself but also between self, community, state and global institutions. Therefore, individualization and subjectivity not only allow us to better understand the complex constitution of the subject but point out to a non-linear understanding of the constitution of state, community and of responsibility.

Correspondingly, within the R2P, the process of individualization retains a prominent place. The operation of human rights, the vision of liberal cosmopolitanism and of 'responsibility' within the responsibility to protect concept attempts to transcend state-centred politics. The subject of protection of R2P is not the state but populations and the body itself. Furthermore, it is the state that is called upon to constantly provide for the subject's protection. In practice, the international community only temporarily assumes collective political responsibility and only in the moment of decision; the question of responsibility always returns back to the political authority of the sovereign state. The sovereign state appears as a unitary subject under international law but it is not. It is as collective as the 'international community' is. Consequently, the paradox of the responsibility to protect is therefore the rhetorical insistence on the collective responsibility of the 'international community' – while the discharge of collective responsibility is realized through a form of legal individual responsibility – 'sovereignty as responsibility'. Furthermore, it appears that it is only in the face of 'failure' that the international community assumes collective responsibility. In relation to R2P, the materialization of the international community is temporal. In contrast, both the demand for state responsibility and its materialization is 'infinite'. The discharge of the social and political responsibility of the international community plays out as action at the moment of crisis and in the form of mediating and managing political transition. In addition, as also discussed in the next section, not only sovereignty as responsibility in international law is a form of individual legal accountability that

⁶⁰⁵ *Ibid.*, p. 53.

limits the horizon of realizing the collective dimension of responsibility but it is also particularly empowered through its attachment to ICL and the ICC and their authoritative character. The oxymoron within the responsibility to protect concept is on one hand the *universalist aspiration* of cosmopolitanism and on the other the *particularist realization* of that aspiration.⁶⁰⁶ The next chapter will probe deeply into other causes and effects of this paradox, the point here is to establish individualization as an important element in the organization of irresponsibility in relation to R2P and to provide an example.

The process of individualization in relation to R2P has an effect on the process of recognition of both individual and collective political subjectivity. I will return to this issue in chapter 4. For the time being, it is sufficient to note, that legal cosmopolitanism embraces the belief that the management of complex conflicts *is feasible*; that it *is possible*, in the words of Bellamy, “to shape the perpetrator’s incentive structures or encourage internal dissent within the perpetrating elite.”⁶⁰⁷ This is based upon the assumption that not only there is a certain international political subjectivity but we can distinguish and manipulate accordingly other subjectivities. According to O’Callaghan, Walzer and his communitarian ethics, from which his just war theory emerges, cannot capture the constitutive relationship of the subject’s formation: “the auto-effective tradition contends that the self can engage with the outside world because it is assured of its own subjectivity.”⁶⁰⁸ The implications of the processes of individualization are in this sense essentially exposing not only the complex process of subject formation but of community and state formation. ‘Sovereignty as Responsibility’ - the legal and political ‘individual’ responsibility of the state to its people - isolates the failed state and allows the ‘international community’ to adopt paternalistic and particularistic policies since those states are blameworthy of their condition. The exclusion of alterity seems necessary for the community’s

⁶⁰⁶ Vivienne Jabri. (1998). Restyling the Subject of Responsibility in International Relations, *Millennium: Journal of International Studies*, Vol. 27, No. 3, pp. 591-611, p. 593.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ Ronan O’ Callaghan. (2016). *Walzer, Just War and Iraq: Ethics as a Response*, Routledge: Interventions, p. 74

continuation and of “authentic communal life”.⁶⁰⁹ Furthermore, Walzer posits that regime change is preferable, supporting that intervention “can restore the minimal self-determination without altering the ability of the community to build a maximal shared life.”⁶¹⁰ By way of empirical analysis O’Callaghan contends that in fact, the intervention, post-war reconstruction (the US constitutional plan) and the subsequent de-ba’thification within Iraq’s already distraught community furthered the ethno-sectarian conflicts. In fact, the Sunni populations felt that they were punished for Hussein’s crimes and were excluded from important societal positions. These men had been integrated under Hussein within the security forces and thus were military trained.⁶¹¹ This model of liberal cosmopolitan protection is one in which certain parts of the population are used as agents of internationally backed local governance while others become expendable and subject to punishment.

In contrast to the intervention in Iraq, the removal of the regime in Libya happened with the support of the ‘international community’. The decision to intervene in Libya under Resolution 1973, according to Hehir, is not to be considered as a unique decision, however “it is certainly coherent with the spirit of R2P.”⁶¹² The humanitarian emergency in Libya in contrast to what was portrayed by mainstream media and supported by NATO and its allies was not an emergency of the sort of Rwanda. Despite the facts, in the history of humanitarian interventions, the decision to use military force to halt the killing of Qaddafi’s adversaries was swift and was also promptly celebrated by liberal internationalists as ‘a new politics of protection’ championing the language of R2P.⁶¹³ The intervention has also been closely linked to the work of the ICC.

⁶⁰⁹ Alex J. Bellamy. (2015b). When states go bad: The termination of state perpetrated mass killing, *Journal of Peace Research*, Vol. 52, Issue 5, pp. 565-576, p. 575.

⁶¹⁰ O’ Callaghan, *op cit.*, p. 65.

⁶¹¹ *Ibid.*, p. 62.

⁶¹² Aidan Hehir. (2013). The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect, *International Security*, Vol. 38, No. 1, pp. 137-159, Hehir claims the case of Southern Rhodesia and Haiti 1994 are similar cases with Libya, Haiti 2004 could also perhaps join the list.

⁶¹³ Alex J. Bellamy and Paul D. Williams. (2013). The New Politics of Protection? Cote d’ Ivoire, Libya, and the Responsibility to Protect, *International Affairs*, Vol. 82, No. 7, p. 826.

Looking back at the conflict, the intervention did shape the outcome of the political struggle. Hugh Roberts has portrayed Qaddafi as a leader who did not lose completely the respect of his people.⁶¹⁴ Instead, Qaddafi's regime enjoyed a substantial measure of support, as the National Transitional Council (NTC) did. Libyan society was divided and, from one point of view, political division was in itself a hopeful development since, it signified the end of the old political unanimity enjoined and maintained by the Jamahiriya. In quickly removing Qaddafi from power the struggle lost a very important element in the recreation of government - political confrontation. Roberts argues that the impression given through Western media of a coherent public voice condemning Qaddafi and demanding his removal, was partially biased. Western media and pro-intervention forces implied that within the mass of voices which demanded the removal of Qaddafi resided a vision of a specific, coherent, even democratic society which the liberal states and international organizations can partner with.

Research for this thesis commenced in January 2011, amidst what emerged as the 'Arab Spring' of the Middle East. Both the intensity and size of the demonstrations produced a sense of anxiety and disorientation of what the future holds for the region. The demonstrations brought to light an array of divergent voices and identities from various socio-economic and religious backgrounds in the Middle Eastern and North African regions, "long dismissed as prisoners of the 'Oriental soul.'" ⁶¹⁵ Following the self-immolation of Mohamed Bouazizi on December 17, 2010 in Tunisia and the successful ousting of president Ben Ali, who held the presidential office since 1987, mass demonstrations followed in Libya, Yemen, Egypt, Syria and Bahrain. Egypt while remaining fragile to violence and authoritarianism managed to oust Hosni Mubarak and form a central government. The revolutions, which took place in Libya, Syria and Yemen, did not result in such swift regime change but plummeted into a struggle for power between very different political subjectivities, ranging "from the secular to the

⁶¹⁴ Hugh Roberts. (2011). Who Said Gaddafi Had to go?, *London Review of Books*, Vol. 33, No. 22, November, pp. 8-18.

⁶¹⁵ Anna M. Agathangelou, Nevzat Soguk. (2011). Insurrectional Politics, the "Arab Streets, and Global Revolution in the 21st Century. *Globalizations*, Vol. 8, No. 5, pp. 551-558, p. 551.

neoliberal to Islamist.”⁶¹⁶ The next day could see the secular or neoliberal camps aligning with the Islamist, the Islamist with the secular or neoliberal. Political subjectivity is an uncertain phenomenon always marked by change. Libya is currently (2018) split between rival political factions and militias with no effective central government in sight. The UN-backed Government of National Accord (GNA) led by Fayej al-Saraj, is a result of the Libyan Political Agreement signed in December 2015 and the effort of the UN to form a central government. However, the UN-backed government is contested by rival factions, such as the chief commander of the Libyan National Army (LNA) Khalifa Haftar that dominates Eastern Libya and is backed up by Egypt and the United Arab Emirates.⁶¹⁷ Haftar’s LNA is aligned with the Tobruk-based House of Representatives (HoR) and refuses to recognize the UN-backed government in Tripoli.⁶¹⁸ The situation in Libya becomes a fertile ground for other heavily armed groups, such as ISIL, to enter Libya and make territorial gains. Syria entered its seventh year of civil war, in which more than four other countries are militarily involved by providing intelligence, ammunition or financial assistance to either the government, or to the different factions. Turkey is conducting its own war inside Syria against the Kurdish YPG whom it considers an offshoot of the PKK, the US and coalition forces assist the Syrian Democratic Forces and from 2014 have been using all available military technology to annihilate the Islamic State. The different regional, strategic and geo-political interests, that many of these countries see in Syria, do not show any sign that we will be seeing an end to brutality soon. In the age of innovative digital technology and of direct access to information, “few events in recent history have been subjected to so much inadequate and partial reporting”.⁶¹⁹ Indeed, keeping up to date with events and locating reliable sources on both the wars of Libya and Syria is a daunting task, let alone to be able to distinguish between different political subjectivities, perpetrators and victims.

⁶¹⁶ *Ibid.*

⁶¹⁷ Guma El-Gamaty. (2018). Regional Interference is threatening Libya’s future as one state. *Al Jazeera*, <https://www.aljazeera.com/indepth/opinion/regional-interference-threatening-libya-future-state-180307133334067.html>, 7 March.

⁶¹⁸ Isaac El Amrani. (2017). New Risks in Libya as Khalifa Haftar dismisses UN-backed Accord. *International Crisis Group*, 21 December.

⁶¹⁹ Charles Glass. (2016). *Syria is Burning: A short history of a catastrophe*, Verso Books, see Foreword by Patrick Cockburn.

The Western powers in connection with other African and Arab countries, which most of the time, share strategic and financial ties, de-politicised the question of governance and of justice in the Libyan conflict. At the same time they immunized both themselves and partner countries, which retain no better record of mass human rights violations than Qaddafi's Libya within or outside their states, such as Saudi Arabia, Yemen, China, Russia, Turkey and the United States. These states are not solely collaborating on the basis of their cosmopolitan ethos. Much more importantly, they share financial and strategic needs. Reiterating Wallerstein's world-system analysis for a moment here, current cosmopolitan socialization arrives also with a demand "of the acceptance of the very real hierarchies that are the product of the system"⁶²⁰ and an assurance that an efficient, competent world-economy remains in place. We shall be careful not to 'underrate state power' but at the same time when one considers the content of cosmopolitan responsibility one must also "give proper attention to social forces and processes and see how they relate to the development of states and world-orders."⁶²¹ This understanding, by extension, might have the ability to curtail the difference between what cosmopolitan responsibility claims of being and how it materializes.

According to Bauman, "human mutuality and community rest no longer on solidly established traditions, but rather, on a paradoxical collectivity of reciprocal individualization".⁶²² For Chantal Mouffe:

"it is not a question of moving from a 'unitary unencumbered self' to a 'unitary situated self'; the problem is with the very idea of the unitary subject. Many communitarians seem to believe that we belong to only one community, defined empirically and even geographically, and that this community could be unified by a single idea of the common good. But we are in fact always multiple and contradictory subjects, inhabitants of a diversity of communities (as many, really, as the social relations in which we participate and the subject positions they define), constructed by a variety of discourses, and precariously and temporarily saturated at the intersection of those positions".⁶²³

⁶²⁰ Wallerstein, 2011, *op cit.*, p. 37.

⁶²¹ Robert W. Cox. (1981). Social Forces, States and World-Orders: Beyond International Relations Theory, *Millennium: Journal of International Studies*, Vol. 10, No. 2, pp. 126-151, p. 128.

⁶²² Ulrich Beck and Elizabeth Beck-Gernsheim. (2002). *Individualization: Institutionalized individualism and its Social and Political Consequences*, Preface by Zygmunt Bauman, p. xxi.

⁶²³ Chantal Mouffe. (2005). *The Return of the Political*, Verso Books.

As such, the liberal democratic position cannot account for systemic failures because, much more importantly, it fails to appreciate the political space of 'pluralistic democratic order'.⁶²⁴ Liberal cosmopolitan positions and the concept of the responsibility to protect fail to respond to the problems of ethnic and sectarian conflicts because they are confined within the paradox and dichotomy of universalistic aspiration and particularist realization. In this light, a site of 'irresponsibility' within the responsibility to protect is the inability to grasp both the state's and the individual's condition within complex global societal relations and the international political space. Therefore, it seems important to move towards a rethinking of the subject of responsibility in international law and think productively on the limits and effects of empowering, as well as the conditions of disempowering political subjectivity.

'Transference of responsibilities': (a.) the 'unreal' normative pathologies of R2P and (b.) R2P and international criminal justice

The division of spheres of human action is part of the technology of separation, for example the separation of the economic sphere from the legal or the legal from the political and the political from the economic. Veitch calls this phenomenon of social organization '*forms of responsibility transference*'.⁶²⁵ The separation of spheres of human action, for example the separation of the economic from the political, or the legal from the political, is a form of transference of responsibility; treating them as distinct ontological universes eliminates the discomfort resulting from the reality of there being parts of a largest totality. However important, the effects of the separation of the economic and political spheres of action will not be discussed in this chapter.⁶²⁶ Generally, the concept of 'cognitive dissonance'⁶²⁷ describes the mental discomfort or unease experienced by a person who simultaneously holds two or more contradictory

⁶²⁴ *Ibid.*, p. 4

⁶²⁵ Veitch, *op cit.*, p. 60, see also Veitch on the main features of modern social forms of organizations, his criteria mostly formulated as Bauman.

⁶²⁶ For an analysis of the idea of an autonomous self-regulating market and political responsibility see Veitch, *op cit.*, pp. 60-73.

⁶²⁷ *Ibid.* p. 61.

beliefs, values or ideas. When the dissonance reveals itself, the psychological theory suggests that individuals will tend to eliminate the cognition that produces the feeling of unease. In this sense, cognitive dissonance is the experience resulting from the mentality of the separation of spheres of human action. Furthermore, the outcome of the process of separation is the transference of responsibility across institutional settings and self-regulated norm-producing entities.

In relation to R2P forms of transference of responsibility result from the separation of the legal sphere from the political and from the fragmentation of the international juridical field itself. However, the juridical cannot be separated from the political. The juridical is inherently linked to the political, “to the *polis* as its constitutional provision.”⁶²⁸ Furthermore, according to Veitch, a way to transfer responsibility is to “shed the burden of responsibility for one’s fate by transferring it to *a vast monolithic whole*’ – “nature, or history, or class or race, or the ‘harsh realities of our time”, or one can argue to the war-like and self-interested nature of man.”⁶²⁹

a. The ‘unreal’ normative pathologies of R2P

Roland Paris summarized the ‘structural’ problems of the responsibility to protect.⁶³⁰ Roland views the responsibility to protect primarily as policy. Therefore, the way to judge if such policy is effective is by calculating whether its implementation carries what it promises: to protect populations from mass human atrocities. He concluded, through an analysis emphasizing on effectiveness, that the anxieties and problems of the responsibility to protect concept have more to do with its internal logic than with the criteria of its implementation. He identified five ‘fundamental and seemingly irremediable

⁶²⁸ Douzinas, 2006, *op cit.*, p. 42.

⁶²⁹ Veitch, *op cit.*, p. 57, drawing upon Isaiah’s Berlin the concept of political monism: ‘trading moral responsibility for determinist visions and to an unpredictable future order.’

⁶³⁰ Roland Paris. (2014). The Responsibility to Protect’ and the Structural Problems of Preventive Humanitarian Intervention, *International Peacekeeping*, Vol. 21, No. 5, pp. 569-603.

tensions' within the responsibility to protect concept: (1.) The *mixed motives* problem: that intervention for humanitarian reasons always carries the co-existence of both self-interest and altruism, (2.) The *counterfactual* problem: the difficulty in demonstrating success, (3.) The *conspicuous harm* problem: no matter how careful military interventions always cause certain damage, (4.) The *end-state* problem: the difficulty of withdrawal and of regime change and (5.) The *inconsistency* problem: that there will be cases in which masses of civilians are in grave danger but the international community cannot or chooses not to intervene.⁶³¹ These 'pathologies' in Paris's view 'trap' the responsibility to protect concept within its very logic. In a response to the article, Ramesh Thakur, one of the co-authors of the concept disagreed with none of Roland Paris's 'structural dilemmas', however, along with Gareth Evans, they "do not see them as real."⁶³² He goes on to explain the reasons of rejecting such "pessimism".⁶³³ For Thakur, these 'pathologies' do not resonate as real because the responsibility to protect concept *works* as a language, because the concept's 'dynamic' is "refining rather than rejecting the principle".⁶³⁴ In other words, the concept fosters consensus and that is enough. According to Ramesh Thakur: "R2P does not and cannot escape this structural constraint, but it did not create it: the dilemma is inherent in the use of force."⁶³⁵ A form of 'transference of responsibility' thus occurs where the pitfalls and normative inconsistencies are not a product of the responsibility to protect concept; the responsibility to protect concept is not complicit in 'irresponsibility' produced through its operation – normative inconsistencies and pathologies are considered as structural dilemmas of any use of force. In this sense, the responsibility to protect concept achieves what it was meant to achieve – 'a detailed normative articulation' of "international authority to undertake executive action for protective ends."⁶³⁶ In other words, the question is not and cannot be whether the 'internal logic' of militaristic protection practices is

⁶³¹ *Ibid.*

⁶³² Ramesh Thakur. (2015). R2P's 'Structural' Problems: A Response to Roland Paris, *International Peacekeeping*, Vol. 22, No. 1, pp. 11-25, p. 22.

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*, p. 16.

⁶³⁶ Thakur, *op cit.*, p. 14.

effective or coherent. The question of the 'internal logic' of the responsibility to protect is out of the table; it does not even register as 'real' (whatever this means). For Thakur, "R2P does not address the distribution of jurisdiction and authority among states, but between states and international actors."⁶³⁷ Here, Thakur fails to account for the issue of equality among states, that being the distribution of jurisdiction and authority.

For proponents of R2P, the problem of juridical inequality is not conceived of as a foundational problem of the responsibility to protect concept: the issue of inequality is a 'reality' of international political life but not of law or policy. In this sense, juridical inequality does not and should not impede the work of the law. R2P is purely a set of criteria that trigger the international authority to use violence for protection purposes. According to Thakur, the 'choice' today is not between intervention or non-intervention, "but whether the intervention will be ad hoc or rules based, unilateral or multilateral and decisive and consensual".⁶³⁸ Just war theory (and R2P) cannot measure, judge or conceptualise collective and outward responsibilities. It is not in the interest of the just war theorist to do so. Just war theory begins with the threshold criteria of intervention so that *all* questions of responsibility are not considered. The terminology given by just war theorists to just war theory as 'applied ethics', allows disengagement from the question of ethics and of collective responsibility per se. In other words, just war theory works as 'irresponsibility' precisely because it closes the question of ethics and thus the question of responsibility. For Veitch, "the organization of irresponsibility is precisely the inability to have the question of responsibility raised at all – at its most powerful".⁶³⁹

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

⁶³⁹ Veitch, *op cit.*, p. 107.

b. R2P and international criminal justice

Both the ICC and R2P share a common vision: the commitment to avert mass crimes and to become the means to that end. Frédérick Mégret rightly states that the ICC and R2P projects should be seen as ‘practices of power’ that complement each other and, are mutually dependent and constitutive.⁶⁴⁰ According to Mégret both share ‘classic features of idealism’, are “at the *avant garde* of a movement that seeks to endow states with positive as opposed to negative obligations” and both are ‘technocratic projects’.⁶⁴¹ Their intimate relationship points also to a ‘darker side’. While being presented as projects that seek to minimize violence and constrain power and sovereignty, they gravitate towards both power (in the form of the authority of the Security Council and ‘Great power’ prerogative) and sovereignty (both rely on state cooperation) for their implementation.⁶⁴² According to Mégret:

“both share a certain fascination with violence, either the violence that is in the criminal law or the violence that is in intervention. They vie for the legitimate control of this violence if only to claim that atrocities should be confronted with more violence... In this they are obsessed with political violence, as opposed to the manifold ways in which violence operates in the world and at the risk of doing violence”.⁶⁴³

The intervention in Libya was marked by its connection with the work of the ICC and the obsession to prosecute Qaddafi.⁶⁴⁴ UNSCR 1970 (2011), the previous resolution to UNSCR 1973 which authorized all necessary means, referred the situation to the prosecutor of the ICC, imposed an arms embargo, asset freezes and travel bans to individuals linked to Qaddafi.⁶⁴⁵ The seven-month Operation ended on 31 October 2011 signalled by Qaddafi’s capture, and subsequent killing, by anti-Qaddafi fighters on the ground (20 October 2011). Qaddafi’s killing by ground fighters went viral over the Internet and social media. Every person who had access to the Internet had also instant access to Qaddafi’s final hours, in which a “dazed, confused, and blood-soaked” Qaddafi was lynched and killed by

⁶⁴⁰ Frédérick Mégret. (2010). ICC, R2P and the International Community’s Evolving Interventionist Toolkit, *The Finnish Yearbook of International Law*, Vol. 21, pp. 21-51.

⁶⁴¹ *Ibid.*, pp. 21-22.

⁶⁴² *Ibid.*, pp. 24-36.

⁶⁴³ *Ibid.*, p. 23.

⁶⁴⁴ Stahn, 2012, *op cit.*

⁶⁴⁵ UNSCR 1970 (2011), undocs.org S/RES/1970, 26 February.

fighters who rejoiced over his capture, humiliation and eventual killing.⁶⁴⁶ Considering that Qaddafi was under an ICC arrest warrant from November 2011 until his death, there was no condemnation of Qaddafi's killing, albeit a brief statement two months later by Luis Moreno Ocampo, former chief ICC prosecutor, at a UN briefing following an SC meeting, in which he stated that Qaddafi's death "creates suspicions... of war crimes".⁶⁴⁷ In contrast, the immediate responses following the dictator's extrajudicial killing did not include such cautious rhetoric. Barack Obama saw the death of Qaddafi as an opportunity to celebrate US policy in the Middle East:

"For the region, today's events prove once more that the rule of an iron fist inevitably comes to an end. Across the Arab world, citizens have stood up to claim their rights. Youth are delivering a powerful rebuke to dictatorship. And those leaders who try to deny their human dignity will not succeed."⁶⁴⁸

Hillary Clinton, moments after Qaddafi's death, laughed about it in an interview stating "We came, we saw, he died."⁶⁴⁹ The work of the ICC was connected with such moralizing rhetoric and in fact, connecting the intervention with the seemingly politically neutral work of the ICC served to hide the morally contentious effects and aims of the intervention, as well as the politically charged significance of the fact that the rebels might have also committed 'crimes against humanity'.

Christine Schwöbel argues that international criminal law provides comfort against the discomfort of international human rights law.⁶⁵⁰ Traditionally, international law is concerned with theorising state responsibility and individual criminal responsibility. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts⁶⁵¹ is one such culminated attempt. However, criminal state responsibility has always been met with certain hesitations. The

⁶⁴⁶ Yuval Karnier, Amit Lavie-Dinur, Tal Azran. (2014). Broadcast coverage of Gaddaffi's final hours in images and headlines: A brutal lynch or the desired death of a terrorist?, *International Communication Gazette*, Vo. 77, Issue 2, pp. 171-188, p. 171.

⁶⁴⁷ Media Briefing, ICC Prosecutor, Louis Moreno Ocampo, 15 December 2011, Retrieved from un.org.

⁶⁴⁸ The White House, Office of the Press Secretary (2011, 20 October). Remarks by the President on the death of Muammar Qaddafi, Retrieved from obamawhitehouse.archives.org.

⁶⁴⁹ CBS NEWS, October 20, 2011, Hillary Clinton on the death of Muammar Qaddafi, cbsnews.com.

⁶⁵⁰ Christine Schwöbel, *op cit*.

⁶⁵¹ International Law Commission. (2001). Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, A/52/10, Retrieved from legal.un.org

approach that the ILC took was to change the focus of attention from the notion of international state crimes. The Draft Articles focused instead on describing the criminal liability model for internationally wrongful acts, to the specific consequences of a breach of obligations *erga omnes* and of peremptory norms (*jus cogens*).⁶⁵² In addition, it attempted to establish a legal framework of attributing responsibility to particular agents of the state.

The notion of both state responsibility and individual responsibility draws its content from a variety of sources: international humanitarian law, case law on state responsibility, the Genocide Convention, the UN Charter and other primary and secondary sources. The centrality, which the regime of human rights acquired over the years, suggests that states are asked constantly to account for any allegations of gross human rights violations perpetrated within their borders. An example of such a practice of accountability is the call for emergency sessions of the UNSC as regards to the commissions of crimes against humanity. The legal primacy of individual criminal responsibility in international law is attributed to the idea that collective (criminal) responsibility is a legal fiction.⁶⁵³ International criminal law works procedurally through an individual criminal liability model. Therefore, from a legal point of view, individual criminal responsibility in terms of prosecution and indictment is carried out relatively straightforwardly, as opposed to state responsibility. Adversarial third-party adjudication conducted in judicialized settings is reasoned on accountability determinations of the individual as the central unit for action.⁶⁵⁴ Theorising individual criminal responsibility is also in this sense relatively unproblematic.

As discussed, socio-historical analysis suggests that mass crimes in the history of mankind were not performed or executed by single individuals. Instead, mass human rights atrocities were perpetrated through organized structures. In the trials and convictions of the Nuremberg and Tokyo tribunals, the concept of

⁶⁵² Shaw, 2008, *op cit.*, p. 807 to 808.

⁶⁵³ Hans Kelsen. (1943). Collective and Individual Responsibility with particular regard to the punishment of war criminals, *California Law Review*, Vol. 32, Issue 5, Article 3, pp. 530-571, p. 533.

⁶⁵⁴ Mark Drumbl. (2007). *Atrocity, Punishment and International Law*, Cambridge University Press, p. 5.

criminality was not attributed to any state. Instead, international legal practice prosecutes and convicts individual leaders and officials. The establishment of the International Criminal Court is the result of this understanding. Notwithstanding, the broad notion of a state being responsible for internationally wrongful acts or omissions is a well-established feature of international law. It is customary to hear calls for a state to fulfil its responsibilities towards its people, yet juridically that does not suggest the state as a whole. It is the agent who's in command that finally needs to give an account of his acts or omissions.⁶⁵⁵ The problem and paradox here is one in which international criminal responsibility is concerned with individual responsibility “*whereas specific sanctions of International Law constitute collective responsibility.*”⁶⁵⁶ When the ‘international community’ kills in the name of human rights and protection, who gives an account for the suffering and violence it produces? Or, does international criminal responsibility truly address the issue of mass atrocities? Collective military interventions for protection purposes can also result in acts of collective punishment. What one can observe is a paradox with regards to individual/collective responsibility and individual/collective punishment in international law.

Mark Drumbl argues that Western practices of punishment drawing upon Western domestic law are inadequate in responding to mass atrocities, “participation in atrocity becomes a product of conformity and collective action, not delinquency and individual pathology.”⁶⁵⁷ It has often been claimed that the domestic to international analogy, where criminal justice reasoning follows the model of ‘proscription, determination of responsibility and intentional infliction of pain’ in the form of punishment is “a degradation of the international criminal justice.”⁶⁵⁸ Theories of punishment have been uncritically reshuffled for the

⁶⁵⁵ Marina Spanendi. (2002). State responsibility v. Individual responsibility for international crimes: Tertium Non Datur?, *European Journal of International law*, Vol. 13, No. 4, pp. 895-899.

⁶⁵⁶ Hans Kelsen, *op cit.*, p. 533.

⁶⁵⁷ Mark Drumbl. (2007). *Atrocity, Punishment and International Law*, Cambridge University Press, p. 8.

⁶⁵⁸ Immi Tallgren. (2002) The Sensibility and Sense of International Criminal Law, *European Journal of International Law*, Vol. 13, No. 3, pp. 561-595, p. 566.

demands of international authority.⁶⁵⁹ Drumbl submits that empirical analysis of the cases of Rwanda and Afghanistan highlight that “structural simplicity pursued by the prevailing paradigm of persecution and incarceration squeezes out the complexity and dissensus of central and meaningful process of justice and reconciliation.”⁶⁶⁰ He proposes an advancing from ‘law to justice’, the incorporation of bottom-up input and of extra-legal initiatives under which a broader understanding of responsibility for atrocities might create the possibility of discharging the collective responsibility implicated in mass atrocities.⁶⁶¹ Drumbl’s critique of international criminal responsibility should be valued. Indeed, to ‘expand the lexicon of international justice’ and “classify the great evils as something more than just crimes”⁶⁶² opens up the possibility of a broader horizon of conceptualizing responsibility and punishment in the international realm. However, is such an approach in terms of ‘theorizing responsibility’ with regards to mass human atrocities enough? What becomes of collective responsibility if international criminal accountability becomes normality, while collective sanctions amounting to forms of collective punishment remain rooted in the apparatuses of the UNSC or NATO and its allies?

In the words of Michael Dillon, proponents of criminalization of social and political violence:

“appeal to a system of individual moral subjectivity that, in the very absence of any transcendental authority guaranteeing it, they seek to employ as a material system, specifically through juridification, ... to translate politics and the disputes of which it is comprised into administration and policing.”⁶⁶³

The criminalization and legalization of social and political violence casts a shadow over the prospective and retrospective responsibilities of authority. The mainstream claim in support of individual criminal punishment is that it restores the dignity of the victim and carries didactic determinations in order to deter

⁶⁵⁹ For a comprehensive analysis of theories of punishment see David Garland. (1991). *Sociological Perspectives on Punishment*, *Crime and Justice*, Vol. 14, pp. 115-165.

⁶⁶⁰ Drumbl, *op cit.*, p. 10.

⁶⁶¹ *Ibid.*, p. 15.

⁶⁶² *Ibid.*, p. 182.

⁶⁶³ Michael Dillon. (1998). Criminalizing social and political violence internationally, *Millennium: Journal of International Studies*, Vol. 27, Issues 3, pp. 543-567, p. 544.

future atrocities of a similar kind from occurring. Yet, the focus on the individual overshadows the political context. This, says Koskeniemi, is not to suggest that collective responsibility shall always take precedence over individual determinations but rather that in each case perhaps both are better than the permanent legal rationale of individual accountability.⁶⁶⁴ If the promise of international criminal trials is to give an account of what had happened or to deter:

“the truth is not necessarily served by an individual focus it may rather obstruct this process [historical truth] by exonerating from responsibility those larger (political, economic, even legal) structures within which the conditions of criminality have been created – within which the social normality of a criminal society emerges”⁶⁶⁵

Political conflicts are conflicts of ideologies. Through this lens, ‘humanity’ (i.e. in crimes against humanity) should not be seen and treated as a fixed totality. Instead, political conflicts reveal the fragility and uncertainty of what ‘humanity’ means; in conflict, it is precisely ‘humanity’ that is being contested. In this sense, the work of the ICC and broadly the universal criminalization of social and political violence should be seen as moments in which particular views on humanity are being both contested and *re*-inscribed. According to Koskeniemi when international criminal trials take place the whole system of international criminal jurisdiction is on trial.⁶⁶⁶ In such cases it should be reminded, according to Koskeniemi, “no moral community is being affirmed beyond the elusive and self-congratulatory ‘international community’”.⁶⁶⁷ In this sense, we should take note of the varied meanings and representations of both ‘humanity’ or ‘international community’, especially when these materialize through the practice of R2P and the work of the ICC and thus under the same banner of ‘protection’. In other words, we should turn to the “semantics of intervention”, as Stahn noted, to understand the effects of folding humanitarian rationales with punitive ones.⁶⁶⁸

⁶⁶⁴ *Ibid.*, p. 15.

⁶⁶⁵ *Ibid.*, p. 13.

⁶⁶⁶ Martii Koskeniemi. (2002). Between Impunity and Show Trials, *Max Planck Yearbook of United Nations Law*, Vol. 6, pp. 1-35, p. 9.

⁶⁶⁷ *Ibid.*, p. 11.

⁶⁶⁸ Stahn, 2013, *op cit.*

Furthermore, we should be wary of the political selectivity of international individual criminal prosecution. Simply put, if going to war against Iraq was a ‘mistake’, but Qaddafi’s ‘mistakes’ were ‘crimes against humanity’, human rights materialize, in the words of Gerry Simpson, as “human rights with a vengeance” or in this sense, ‘humanity’ with a vengeance.⁶⁶⁹ What Simpson and Koskeniemi in fact argue, is that we should be cautious to *how* international criminal justice takes place, in what historical and political context and what is perhaps being excluded in its application. International criminal justice can function to both overshadow the political context of international violence by focusing on the individual and, at the same time, relativize and disturb the concepts of sovereign equality, the concept of international ‘protection’ and the concept of ‘humanity’. In other words, what is being relativized is the concept of responsibility in international law per se. In this sense, both the criminalization of social and political violence and prosecutions in the name of universal justice and humanity should be seen as ‘responsibility practices’. This lens can point to the *limits* and *collective consequences* of such ‘responsibility practices’. If international criminal justice prosecutes and punishes, as Simpson put it, “only those on the wrong side of history”⁶⁷⁰ then, sometimes, we might be better off without such justice. In the words of Simpson:

“International criminal justice – the great institutional machine engineered by talented and humane diplomats, kept in motion by lawyers who have sacrificed material reward for a life in pursuit of humanitarian ends, directed at putting defeated enemies and human rights violators in jail, and celebrated every week in a public lecture advertising its virtues – might now be one of the less auspicious ways to do good in the world.”⁶⁷¹

Christopher K. Lamont, in his study of transitional justice mechanisms placed in Libya in the aftermath of the UN authorized intervention, claimed that Western-backed practice was complicit in the fabrication of an ‘exclusionary’ and ‘highly retributive’ form of justice resembling political and social ostracization of “local sources of authority that did not fall within Western conceptions of the liberal

⁶⁶⁹ Gerry Simpson. (2016). Human Rights with a Vengeance: One Hundred Years of Retributive Humanitarianism, *Australian Yearbook of International Law*, Vol. 33, pp. 1-36, Kirby Lecture, 2015, ANU.

⁶⁷⁰ *Ibid.*, p. 30.

⁶⁷¹ *Ibid.*, p. 36.

state”.⁶⁷² As in the case of Iraq noted earlier, these now isolated groups were politically active and most of the times heavily armed. Nevertheless, the United Nations Support Mission in Libya (UNSMIL) did not suspend western-backed transitional justice efforts but instead made transitional justice a vital and strategic component of post-Libya reconstruction. Further, it continued to back ‘internationally recognized governments’ even if it ‘noted’ that Libyans were “distrustful of political institutions, such as parliaments and political parties” and supported transitional justice laws to which revolutionary armed groups were amnestied, whereas the old state apparatuses and affiliates of the Qaddafi regime were suppressed and targeted.⁶⁷³ It also persisted to support the NTC’s transitional justice mechanisms even if these “challenged existing international legal norms and standards.”⁶⁷⁴ Post-conflict reconstruction is an important part of R2P, the situation in both Iraq and in Libya does suggest however how ‘irresponsible’ can these legal mechanisms prove to be in the face of deeply sectarian and ideological conflicts. The report which the UNSMIL provided, to be executed by the NTC, submitted in 2012, singled out any reference to Islamic political thought which seemed to be an integral component of justice shared by a big part of the Libyan society. UNSMIL provided a blue-print document with a ‘diagnosis’ of the crimes committed and the mechanisms that were to be used in order to uncover the ‘truth’.⁶⁷⁵ According to Lamont:

“rather than viewing local actors as instrumentalizers of transitional justice, peace-building and state-building practices should be acknowledged as generating conflict between local governance practices and transitional justice is just one of the axes along which these conflicts play out.”⁶⁷⁶

If the aim is to form an inclusive civil society and stable welfare institutions, at least “resistance to international norms and practices of transitional justice

⁶⁷² Christopher K. Lamont. (2016). Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya, *Journal of Intervention and Statebuilding*, Vol. 10, No. 3, pp. 382-399, p. 386.

⁶⁷³ *Ibid.*, p. 390, citing Marieke Wierda, UN’s transitional justice team said on Libya’s transitional justice, “These approaches risked exacerbating Libya’s division and will make it more difficult to forge national unity”.

⁶⁷⁴ *Ibid.*, p. 392, Lamont makes a very interesting point which there is no space to discuss further relating to the discourses on martyrdom, Libya’s *thuwwar* promoted measures which privileged those who died as martyrs (shaheed), as opposed to victims, both symbolically and materially.

⁶⁷⁵ *Ibid.*, p. 394 and 395.

⁶⁷⁶ *Ibid.*, p. 395.

should be interpreted not as recalcitrance but rather as attempts to advance alternative political orders.”⁶⁷⁷ As Tallgren has posed:

“Perhaps international criminal law serves a purpose of simultaneously both to reason and to mystify political control exercised by those to whom it is available in the current ‘international community’. Perhaps its task is to neutralize, to exclude from the political battle, certain phenomena which are in fact the pre-conditions for the maintenance of the existing governance...”⁶⁷⁸

In some very important ways the work of the ICC and the focus on the individual marginalizes a set of questions that have to do with the ‘collective’ and political authority of both R2P and the ICC. ICL and the work of the ICC are sites of comfort for R2P. Both the work of the ICC and the invocation of ICL can conceal the ‘politics’ of intervention under the neutral banners of justice for the victims and punishment for the perpetrators. Their operation in connection with R2P and in the context of an international crisis relieves some of the pressure and anxiety of the political nature of R2P. The correctness and sanctity of ICL, as well as the potency of the ICC to provide authoritative verdicts on perpetrators and victims alike, are attributes that R2P lacks of and finds in the invocation of ICL and work of the ICC.

Concluding Remarks

This chapter attempted to illustrate the relationship between social modes of organizing responsibility practices, their mentalities and R2P. The ‘sites of irresponsibility’ (i.e. division of labour, individualization, “transference of responsibilities”) within R2P demonstrate that these are not merely implementation gaps; they are intrinsic because they are products of social modes of organizing responsibilities and thinking. As such, *irresponsibility is internal to R2P*.

One of the insights of this chapter is that the form of international cosmopolitan policing, which R2P fosters, fails to understand the political subjectivity of both

⁶⁷⁷ *Ibid.*, p. 383.

⁶⁷⁸ Tallgren, *op cit.*, p. 593-595.

community and subject formation. If the form of political subjectivity imagined is one that conforms only to “a liberal projection of what constitutes the emancipated self and one that assumes universal rights as the necessary discursive and juridical precondition for the emergence of the political subject”⁶⁷⁹, ‘cosmopolitan solidarity’ never materializes, it is something other than what it claims. As asserted by Jacques Rancière: “politics cannot be defined on the basis of any pre-existing subject.”⁶⁸⁰ A connecting further insight was that the assertion of the ‘international community’ in relation to R2P is an act of self-constitution. Likewise, its promised ‘responsibility’ can also be seen as such a process or act.

The urgency for action transforms the responsibility within R2P into a temporary project. The question is not whether R2P delivers what it promises, what kind of meanings it creates and what are its effects; the use of military force for human protection purposes is not to be contested. As Ramesh Thakur put it, “conceptual purity and analytical consistency is a requirement of academic rigour divorced from the untidy and messy real world of politics inhabited by policy-makers.”⁶⁸¹ The main and comfortable claim here is that there are no alternatives; immediate and direct use of military force is necessary (e.g. “real world of politics”) in the face of mass atrocities and mass human rights violations. This is an ideological and highly politicized claim in its own right. Such claims, from proponents of R2P, have the potential to overshadow the structural conditions of mass atrocities, to foreclose the possibilities of imagining alternatives, and to control and organize the discursive framework of responsibility practices. Furthermore, legal rationality and individual legal accountability work well with this pattern of thinking since they fulfil the desires for certainty and mastery that the use of military force prescribes (e.g. the relationship between R2P and international criminal justice).

⁶⁷⁹ *Ibid.*, p. 635.

⁶⁸⁰ Jacques Rancière. (2010). *Dissensus: On politics and Aesthetics*, Steven Conrad (ed., tr.), Continuum, p. 27.

⁶⁸¹ Thakur, 2015, *op cit.*, p. 11.

Instead, the ‘notion of irresponsibility’ developed in this chapter attempts to highlight those social modes that organize responsibility and are being excluded by such patterns of thinking. This chapter has shown that collective and political notions of responsibility, as well as the ‘pathologies’ of R2P remain largely unacknowledged by the mainstream discourse around R2P. The division of labour and its attendant role responsibility, the processes of individualization and the varied ways ethico-political responsibilities are transferred and disavowed with regards to R2P are to be seen as primary ‘sites’ of vulnerability. These features are not only of analytical value; such ‘sites’ inhibit responsibility practices and have material and ‘real world’ consequences. In the introduction of the chapter I referred to the recognition of ‘irresponsibility’ as a site of discomfort: “of intellectual restlessness”.⁶⁸² If what is lost in the preference of comfort over discomfort is the possibility of recognition of ‘sites of irresponsibility’, the real loss is the intention to be critical and reflective.

To this end, proponents of R2P are not interested in what becomes of responsibility towards the Other in theory and practice, but that it enables policy-makers to construct international moral arguments and to argue within a predetermined moral framework the case for international action. In this sense, the responsibility within R2P is best seen as a technocratic responsibility, a formality. As Jabri suggests, when cosmopolitanism works as a practice of government it is a politics that places primacy on security, rather than a politics defined through solidarity.⁶⁸³ From this point of view, the responsibility to protect concept begins to look more as a responsibility to control rather than to protect. The next chapter turns to ‘international political subjectivity’ - how individual and collective subject formation emerges in relation, in being-with, the other – to argue that the global ethical responsibility we find in R2P emanates from a *foreclosing structure of address*.

⁶⁸² Christine Schwöbel, *op cit*, p.171 and 184, she derives this notion from Michel’s Foucault ‘Ethics of Discomfort’ and Judith Butler’s idea of the Language of Discomfort, see also the relevant notion of *parrhesia* (i.e. to risk oneself in speaking the truth to power) in Michael Foucault. (2010). *The Government of Self and Others: Lectures at the Collège de France 1982-1983*, Palgrave Macmillan.

⁶⁸³ Jabri, 2012, *op cit.*, p. 633.

CHAPTER FOUR

THE RESPONSIBILITY TO PROTECT AS A FORECLOSING STRUCTURE OF ADDRESS

Introductory remarks

One of the connecting threads of this thesis has been to reflect on the meaning, effects and limits of ‘responsibility’ within R2P. So far, the analysis has explored the dominant vantage point(s) of thinking about the issue of protection and some of the normative assumptions that underpin the justifiability of the use of violence for protection purposes. Chapter 2, investigated both ‘classical’ and ‘contemporary’ uses of just war thinking in relation to the concept and highlighted how and why just war thinking pervades accounts, which tend to support R2P. Chapter (3) investigated three main features of modern forms of social organization with their ‘attendant mentalities’, as signified by Veitch, and how these features relate to and manifest within the theory and practice of the R2P. These were: (1) the division of labour and the significance of role responsibility; (2) the meaning and effects of processes of individualisation and (3) how “transference of responsibilities” occurs in relation to the concept. The resulting insight gained from their analysis was that sites of irresponsibility are fabricated from the inside out. That a notion of *irresponsibility is internal to responsibility practices* with regards to protection, as these emanate from modern forms of social organization and their ‘mentalities’. Following Veitch’s proposition, this ‘irresponsible mentality’ disconnects effects and causes and discriminates between suffering in the presence of legal institutions and within organized responsibility practices. Through this lens, irresponsibility in relation to the responsibility to protect concept can be thought of, not merely as one of ‘implementation’, ‘procedure’, ‘legality/illegality’, ‘authorization’ and ‘consensus’, but as *structural, complex, constitutive and ‘mental’*. Broadly, responsibility is

better conceived as ‘an ability to respond’ and not merely as legal accountability and blameworthiness.⁶⁸⁴

A further insight gained through the above mode of analysis is that distinctive notions of human subjectivity inform concepts and organized practices of global responsibility. As Outi Korhonen and Toni Selkälä also note, “the recognition of subjectivity is at the core of different concepts of responsibility.”⁶⁸⁵ Or, as Anne Orford pointed out, the theme of responsibility “addresses the conflict at the very interior of the subject, whether that subject be the liberal individual, the sovereign state, or the discipline of international law.”⁶⁸⁶ Coextensively, I understand the responsibility to protect concept as a dominant institutionalized moral language and framework that is linked, both to the historical site of its emergence and to a juridico-moral history, a history *as* responsibility (as discussed in Chapter 2, R2P links back to the ethical framework of just war theory). The concept points to particular views of human and political subjectivity both in theory and in practice. As a final chapter and ‘layer’ in the critique of R2P that this thesis provides, this chapter explores how individual and collective subject formation emerges in relation, in being-with, the other. When it comes to protection practices, moving the lens to ‘international political subjectivity’, has analytical and substantial value for international lawyers, policymakers and the discipline itself. If the way international law, international lawyers, policy makers and security officials push, more or less, towards particular forms of political subjectivity, what kinds of subject or identity relations emerge? What kind of global ethical responsibility is communicated through R2P and its ‘international community’?

This chapter argues that the global ethical responsibility we find in R2P emanates from a ‘foreclosing’ structure of address. Such a foreclosing structure fails the

⁶⁸⁴ See also John Gardner. (2003). The Mark of Responsibility, *Oxford Journal of Legal Studies*, Vol. 23, No. 2, pp. 157-171.

⁶⁸⁵ Outi Korhonen and Toni Selkälä. (2016). Theorizing Responsibility, Chapter 32, in Anne Orford and Florian Hoffmann, *The Oxford Handbook of the Theory of International Law*, Chapter 32, pp. 844-861.

⁶⁸⁶ Anne Orford. (2006). A Jurisprudence of the Limit, in Anne Orford (eds.), *International Law and its Others*, Cambridge University Press, p. 4.

promise of protection and of cosmopolitanism at an inter-subjective level and transforms global ethical responsibility into a project of governance, management and control. This vantage point is one in which the ‘international community’ of liberal international law and of legal cosmopolitanism projects self-assuredness, in terms of identity, of legality and legitimacy and of sovereignty; and fails to account for the limits of its own self-understanding, its internal irresponsibility and violence. It communicates a duty of care that is based primarily on punishing violators of a liberal international order, rather than on recognition, protection and/or solidarity. The juridico-moral framework of R2P in theory and practice both constitutes and is constitutive of forms of political subjectivity. Therefore, it substantially circumscribes the politico-ethical limits of both theory and practice, as it is materially controlling the structure of a global ethical framework of responsibility. Through the accounts of social and political responsibility we find in Jacques Derrida and Judith Butler, accompanied by relevant critical legal and critical international relations literature, it is possible to gain an understanding of ethical global responsibility grounded in ‘irresponsibility’. Such a concept embodies the internal conditions, paradoxes and ‘aporias’ of responsibility (such as those explored in Chapter 3) and therefore, acknowledges these as parameters to theory and practice. However, it does not consider these parameters as limiting but instead, as conditions of global ethical responsibility. A practice of responsibility could also include, being willing to communicate the limits of self-understanding and the limits of agency; in other words, performing vulnerability, not keeping in secret and exposing oneself. This vantage point yields a radically different approach to global ethical responsibility from that of liberal internationalists and legal cosmopolitans.

a. The ‘terrifying secret’ of responsibility and the ‘economy of sacrifice’

In *The Gift of Death*, Derrida unveils an account of responsibility through the Abrahamic story and Isaac’s sacrifice.⁶⁸⁷ It is a story of the subject’s relation to

⁶⁸⁷ Jacques Derrida. (1995). *The Gift of Death*, The University of Chicago Press.

itself, the relation to self as being before the Other, God, the universal and the particular every Other (the other is every (bit) other).⁶⁸⁸ Along with the ‘mystical’ images that permeate his interpretative account, Derrida “follows the traces of a genius of Christianity that is the history of Europe” and therefore, narrates a story or history of the liberal and post-modern juridico-moral concept of responsibility.⁶⁸⁹ He unveils a paradoxical and binary account of responsibility. His ‘*aporia*’ of responsibility (that irresponsibility appears as the necessary other side of responsibility) is a conceptual figure of thought that negotiates between politico-legal generality and responsibility to the singular other. The idea here is to explore some of these physiognomies of Derrida’s radical account of responsibility.

For Derrida, a sufficiently ‘conceptualized’ or ‘thematized’ concept of responsibility must contain “what ‘responsibility’ means; *that is to say everywhere*.”⁶⁹⁰ In doing so, Derrida insists that a critical analysis of the concept of responsibility should entail, not only particular and general meanings, but also a ‘history’ of responsibility as it is manifested within the range of international political spaces and of subjectivity. Therefore, as Rosalyn Diprose suggests, ‘Derridean’ responsibility should be read as *responsiveness*: “that affirms but also disrupts and critiques one’s cultural heritage, and thereby constitutes the self as *futural*.”⁶⁹¹ According to Diprose, “this self-critique includes a critique of the juridical concept of responsibility we have inherited.”⁶⁹² Through this lens, conceptualizations and thematizations of responsibility that do not take into account effects and meanings that the structure of the juridical concept of responsibility re-produces and operates might yield a closure to the possibilities of approaching or responding to the Other. What figures predominantly in Derrida’s work is a rejection of forms of dogmatism and of logics which would paralyze futurity: “conceptual exigence is necessary, even where it takes into

⁶⁸⁸ *Ibid.*, p. 3 to 4.

⁶⁸⁹ *Ibid.*, p. 3.

⁶⁹⁰ *Ibid.*, p. 25 to 26.

⁶⁹¹ Rosalyn Diprose. (2006). Derrida and the Extraordinary Responsibility of Inheriting the Future-To-Come, *Social Semiotics*, Vol. 16, Issue 3, pp. 435-447.

⁶⁹² *Ibid.*, p. 440.

account the paradoxes and aporias, by accepting that burden and declaring them. It is, once again the condition of responsibility.”⁶⁹³

Derrida’s account of responsibility is complemented by his projects on hospitality and forgiveness, justice, democracy to-come or the ‘heading of the other’. These are some of the ‘figures’ of what he calls the ‘im-possible’.⁶⁹⁴ What could be said about forgiveness could also be said about hospitality, cosmopolitanism and even justice⁶⁹⁵: “Forgiveness is not, it should not be normal, normative, normalizing. It should remain exceptional and extraordinary; in the face of the impossible: as if it interrupted the ordinary course of historical temporality.”⁶⁹⁶ For Derrida, the ‘hyperbolic ethical vision’ of forgiveness can produce “here, now, in the urgency without waiting, responses and responsibilities”⁶⁹⁷, even pushing towards an evolution of the law. Derrida’s aporia is a reality, the im-possibility of responsibility “seizes me here and now”; “this impossibility is thus not a (regulative) *idea* or *ideal*”⁶⁹⁸, it cannot be normatively totalizing. Just as forgiveness, hospitality’s ‘principle’ calls: “*or even creates the desire for, a welcome without reserve and with an exposure without reserve...*”⁶⁹⁹ Through the same lens, responsibility which becomes regulative: “to the strict meaning Kant gave to the *regulative* use of ideas (as opposed to their *constitutive* use), we would, in all rigor, in order to say anything on this subject and, especially, in order to appropriate such terms, have to subscribe to the entire Kantian architectonic and critique”.⁷⁰⁰ It is in this sense that Derrida opposes in part the Kantian ethic of hospitality. The universal law that will ultimately govern the domain of the political conditions of hospitality, circumscribes the form hospitality takes, and thus becomes a contradiction in ‘principle’. For Derrida, the Kantian ethic of

⁶⁹³ Jacques Derrida. (2001). *On Cosmopolitanism and Forgiveness*, Routledge, p. 51.

⁶⁹⁴ Jacques Derrida. (2005a). *Rogues: Two essays on Reason*, Stanford University Press, “of what must remain (in a nonnegative fashion) foreign to the order of the “I can”...”, p. 85.

⁶⁹⁵ Jacques Derrida. (1992). Force of Law: The ‘mystical’ foundation of authority, in Drusilla Cornell, Michel Rosenfeld & David Carlson (eds.), *Deconstruction and the Possibility of Justice*, Routledge.

⁶⁹⁶ Derrida, 2001, *op cit.*, p. 31 to 32.

⁶⁹⁷ *Ibid.*

⁶⁹⁸ Derrida, 2005a, *op cit.*, p. 84.

⁶⁹⁹ Jacques Derrida. (2005b). The principle of Hospitality, *Parallax*, vol. 1, no. 1, pp. 6-9, p. 6.

⁷⁰⁰ Derrida, 2005a, *op cit.*, p. 85.

hospitality is a 'conditioned hospitality', which also becomes a conditional promise. In this sense, it is significant not to conceive hospitality, autonomy, democracy, justice and responsibility as regulative ideas, not to normalize the space of the promise of international law, to be left with "a despairing messianicity or a messianicity in despair".⁷⁰¹ Regulating the promise of justice or of democracy represents for Derrida a closure, which waits indefinitely on a future that is already assigned, always deferring the possibility of a future *in the present*. In a sense, Derrida opposes to such closures because these also limit the potential of creativity and imagination, in the singular moment of deciding on responsible action, specifically at the moment of encounter. If the decision results in a fully pondered ideological and regulative future:

"the decision no longer decides anything but is made in advance annulled. It is simply deployed, without any delay, presently, with the automatism attributed to machines. There is no longer any place for justice or responsibility (whether juridical, political, or ethical)."⁷⁰²

According to Derrida, we do not need to believe in the biblical story of Isaac's sacrifice to recognize the discomfiting and aporetic structure of responsibility. Even if one treats the biblical story and its theological connotations as a 'fable', what is uncovered and exposed is the experience of morality and the paradoxical structure of responsibility.⁷⁰³ European history, for Derrida, is also a history *as* history of responsibility. A history of responsibility that is 'tied up to a culture of death', to an economy of sacrifice and *dying for the other*. Arguably, such a history challenges the amnesia of exploitation and of colonialism through acts of 'responsible protection'. For the proper use of Derrida's aporia in the context of our discussion, we need not to focus so much on the Christian and theological physiognomies of the concept of absolute responsibility Derrida deconstructs, but on the themes at play. Ultimately, this is perhaps the point of Derrida's uncovering of the moral fable, the deconstructionist move and the possibilities that it produces. The interpretative and deconstructionist process produces

⁷⁰¹ See also in *Force of Law* and *Specters of Marx*, Derrida contests the Heideggerian interpretation of *dike* as gathering and adjoining by aligning justice with being *out of joint*, "with the interruption of relation, with unbinding, with the infinite secret of the other", Derrida, 2005a, *op cit.*, p. 90.

⁷⁰² *Ibid.*, p. 85.

⁷⁰³ Derrida, 1995, *op cit.*, p. 66.

necessarily *discomfort* before the impasse of the concept of responsibility, yet such uneasiness becomes a condition of responsibility. Discomfort in this sense is better understood as intellectual restlessness and that ethical responsibility requires openness towards an even imponderable ethical relation, one that has not already been decided and normatively framed. Derrida shares with us that:

“The exercise of responsibility seems to leave no choice but this one, however uncomfortable it may be, of paradox, heresy, and secrecy. More serious still, it must always run the risk of conversion and apostasy: there is no responsibility without a dissident and inventive rupture with respect to tradition, authority, orthodoxy, rule, or doctrine.”⁷⁰⁴

Derrida’s ‘aporia’ of responsibility contains the themes of secrecy, of the other, and of sacrificial logic and points to an economy of subjectivity:

“for if there were no absolutely heterogeneous interiority separate from objectivity, if there were no inside that could not be objectified, there would be no secrecy either. Whence the strange economy of the secret as economy of sacrifice that is brought to bear here.”⁷⁰⁵

As Derrida reminds us, this ‘aporia’ (irresponsibility in responsibility and vice versa) is an everyday phenomenon, and it is intimately linked to an economy of sacrifice. Connected with the insights gained from the analyses of Chapters 2 and 3, the ‘sites of irresponsibility’ explored within the responsibility to protect, can provide both a sense of discomfort and of anxiety; yet also, these sites represent some of the realities, material conditions and expose some of the normative inconsistencies of the concept of the responsibility to protect. This could perhaps be seen as the ‘economy’ of the responsibility to protect concept. We need to remember, as Derrida proposes in the *Gift of Death*, that the “smooth functioning of such society”:

“its discourses on morality, politics, and the law, and the exercise of rights (whether public, private, national or international), are in no way impaired by the fact that, because of the structure of the market that society has instituted and controls, because of the mechanisms of external debt and other similar inequities, that same “society” *puts* to death or (...) *allows* to die of hunger... Not only is it true that such a society participates in this incalculable sacrifice, it actually organizes it.”⁷⁰⁶

⁷⁰⁴ *Ibid.*, p. 27.

⁷⁰⁵ *Ibid.*, p. 101.

⁷⁰⁶ *Ibid.*, 86.

Our responsibility practices, or general responsibility, also relates to the values and relationships that the economy of the market produces “which usually goes together with the juridical grammar that the address has been fair”.⁷⁰⁷ Therefore the ‘aporia’ of responsibility, not only unravels an economy of subjectivity with its internal violence, but also takes place within the economy of sacrifice of the market and through economic exchange.⁷⁰⁸ Derrida here reminds us, that these spheres of human action (economic-legal-political-ethical) cannot be divorced from each other, neither from how the subject embodies and relates to these spheres intimately. Responsibility practices along with their attendant concept of responsibility are located in “everyday discourse, in the exercise of justice, and first and foremost in the axiomatics of private, public, or international law, in the conduct of internal politics, diplomacy, and war, [located within] is a lexicon concerning responsibility that can be said to hover vaguely about a concept that is nowhere to be found...”⁷⁰⁹ Through this lens, responsibility is not a metaphysical concept but is relational, ‘performative’ and political. Derrida’s radical concept of responsibility pushes us beyond an idea of responsibility as legal accountability, even if this seems outrageous or “nihilist or relativist”; “be concerned”, he continues, “in the face of such display of good conscience”, pointing out to the rhetorical use of responsibility in international law and in human relationships more broadly.⁷¹⁰ As it is tied up to a culture of death, responsibility is also tied up to fear, the unknown, and the mystery that surrounds it. This fear can be further interpreted as an anxiety - an anxiety that emanates specifically from a domain of ‘undecidability’ - that manifests in every singular and contextual practice of responsibility. In contrast, perhaps it is also linked to a domain of freedom, reflexivity, deliberation and agency. Trembling occurs as a physical reaction to the scene of address or responsibility, to the unknown and the uncertain. Derrida references the *mysterium tremendum* in

⁷⁰⁷ Giovanna Borradori. (2003). *Philosophy in a Time of Terror: dialogues with Jürgen Habermas and Jacques Derrida*, University of Chicago Press, p. 157

⁷⁰⁸ Anne Orford. (2006). Trade, Human rights and the Economy of Sacrifice, pp. 156-196, and Judith Grbich. (2006). Secrets of the Fetish in International Law’s Messianism, pp. 197-220 in Anne Orford (ed.), *International Law and its Others*, Cambridge University Press.

⁷⁰⁹ Derrida, 1995, *op cit.*, p. 85.

⁷¹⁰ *Ibid.*, p. 85, Derrida does not withdraw from the moment of the decision and its urgency; judgment is surely often needed. He says: “The ethical point of view must remain valid: Abraham is a murderer.”

Kiergaard's essay *Fear and Trembling*, as including an implicit reference to Saint Paul. In the Epistle to the Philippians 2:12, the disciples are asked to work towards their salvation knowing all along that it is God who decides, and not in his presence (parousia) but in his absence (apousia), "without wither seeing or knowing, without hearing the law or the reasons for the law."⁷¹ According to Derrida, Abraham never reveals the secret of the sacrifice of Isaac but *keeps in secret* of what God has ordered him. Here it appears that absolute responsibility implies singularity in the moment of decision but what is also implied according to Derrida is that:

"by not speaking to others, I don't account for my actions, that I answer for nothing [que je ne reponde de rien] and to no one, that I make no response to others and before others. According to Kiergaard, *ethical* exigency is regulated by generality; and it therefore defines a responsibility that consists in *speaking*, that is, of involving oneself sufficiently in the generality to justify oneself, to give an account of one's decision and to answer for one's actions. On the other hand, what does Abraham teach us, in his approach to sacrifice? That far from ensuring responsibility, the generality of ethics incites irresponsibility. It implies me to speak, to reply, to account for something, and thus to dissolve my singularity in the medium of the concept.

Such is the aporia of responsibility: one always risks not managing to accede to responsibility in the process of *forming it*... This is the ethics as "irresponsibilization", as an insoluble and paradoxical contradiction between responsibility *in general* and *absolute* responsibility. Absolute responsibility is not a responsibility, at least not general responsibility or responsibility in general. I need to be exceptional or extraordinary, and it needs to be absolutely and par excellence: it is as if absolute responsibility could not be derived from a concept of responsibility and therefore, in order to be what it must be it must therefore be irresponsible in order to be absolutely responsible."⁷²

By keeping the secret of sacrifice to himself, Abraham betrays his family and the ethical order.⁷³ In this light, it is when we attempt to communicate responsibility through language or law that responsibility necessarily produces sites of irresponsibility. It is in the medium of language and perhaps in the medium of law, that the 'aporia' of responsibility is exposed. As will be discussed later in relation to Butler's account of responsibility, it is in the process of giving an account that the subject cannot determinedly narrate its self because it finds itself in relation to some norms, to an ethical order and within a juridico-moral

⁷¹ *Ibid.*, p. 56, A reference could be made here of Kafka's 'Before the law' – the indefinite state of expectation before the gates of law and of justice - and Derrida's reading of Kafka, see Jacques Derrida. (1992). *Before the Law*, in (ed.) Derek Attridge, *Acts of Literature*, Routledge.

⁷² *Ibid.*, p. 61.

⁷³ *Ibid.*, p. 66.

discourse that precedes and exceeds its own life. In Derrida we can locate an account of responsibility (an economy of sacrifice) that links to the previous Chapter (3) and Veitch's notion of an 'irresponsible mentality' - produced through modern forms and mechanisms of organizing responsibility practices - which is implicated in the production of large-scale harms and in organizing irresponsibility.

b. Cosmopolitanism and its critics

The limits of cosmopolitan promise

Liberal cosmopolitan or liberal internationalist accounts revive, and sometimes reinvent, Kantian metaphysics of universal reason to advance an idea of a unified common humanity under a global public law of liberal democracies.⁷¹⁴ For example, David Held reinvigorates a linear line of Western philosophical thought beginning with the Stoics and the idea of the cosmos as encompassing the whole of humanity. He concludes at a 'Kantian' cosmopolitanism connected with 'public reason', and develops a contemporary understanding based on egalitarian individualism, reciprocal recognition and impartialist reasoning.⁷¹⁵ It is a cosmopolitan legal framework that focuses on participation levels and security. As Held notes, "public policy ought to be focused" on the prevention of serious harms and the conditions "inflicted on people against their will and without their consent."⁷¹⁶ Central to this account is the idea of an autonomous moral agent and of active agency with impartialist reasoning as a "frame of reference" for rules and principles that can be universally shared.⁷¹⁷ It is this view of subjectivity and of liberal cosmopolitanism that becomes the most challenged. Recurrently it becomes the ground upon which "the limits to the moral validity of

⁷¹⁴ See Fernano R. Tesón, *The Liberal Case for Humanitarian Intervention*, in Holzgrefe and Keohane, 2003, (ed.), *op cit.*, p. 96-129, p. 97.

⁷¹⁵ David Held. (2010). *Cosmopolitanism: Ideals and Realities*, Polity Press, Cambridge.

⁷¹⁶ *Ibid.*, p. 49.

⁷¹⁷ *Ibid.*, p. 47, impartialist reasoning works for Held as an heuristic device to test candidate principles of moral worth.

communities” is granted.⁷¹⁸ Gilbert Leung criticizes Held’s cosmopolitanism and asserts that in Held’s account:

“autonomy, pluralism and difference are good, but too much of a good thing ought to be punishable within cosmopolitan courts of law... he [Held] nonetheless gives us a radically open future with one hand and takes it away with the other by ruling out any cosmopolitan structure that is not constituted by the fundamentals of standard liberalism.”⁷¹⁹

Leung contradicts a legally enforced liberal cosmopolitanism with a critical history of cosmopolitanism that aligns with the cynics and a critique on legal coercion and ‘stoic denial’⁷²⁰. For Leung:

“it should be noted that since concrete or active liberty is the particularity of the struggle against shackled life, the end of the end can be realized *not* when the free flow of creative invention is posited as an ideal, but when there is an active engagement in the process of breaking free from formal idealizations.”⁷²¹

Furthermore, Held’s:

“imponderable future goes hand in hand with foreclosure within a fully pondered, ideological and institutional global framework. The remaining task (which might also be viewed as the task of freedom) thus becomes one of the thinking conditions in which such foreclosure is itself foreclosed.”⁷²²

Political authority in this sense becomes legitimized and recognized only when it adheres to liberal cosmopolitan standards. According to Held: “states may forfeit claims to sovereignty, and individuals their right to sovereign protection, if they violate the standards and values embedded in the liberal international order”.⁷²³

From the perspective of legal cosmopolitanism, Hans Kelsen advances a ‘pure’ theory of law where international law is seen “as a world or universal legal system. And the primacy of this world system can be linked with the idea of a universal legal community of human beings overreaching the individual state

⁷¹⁸ *Ibid.*, p. 69, Held develops his 8 paramount principles of ‘cosmopolitan orientation’ in which *active agency* and *personal responsibility as accountability* are paramount.

⁷¹⁹ Gilbert Leung. (2009). A Critical History of Cosmopolitanism, *Law, Culture and the Humanities* 2009, Volume 5, pp. 370-390, p. 373.

⁷²⁰ *Ibid.*, p. 374, Leung poses that stoic thinkers began to identify the Roman Empire as synonymous with the civilized world in which the *ius gentium* was evolving into quasi-universal law.

⁷²¹ *Ibid.*, p. 373.

⁷²² *Ibid.*, p. 373 to 374, see also Gilbert Leung. (2013). Cosmopolitan Ethics From Below, Gilbert Leung, *Ethical Perspectives*, Volume 20, No. 1, 2013, pp. 43-60.

⁷²³ Held, 2010, *op cit.*, p. 124, see also Tesón, 2003, *op cit.* p. 97.

communities, whose validity is rooted in the sphere of morality.”⁷²⁴ The intrinsic element of this legal strand is that the validity of a global public law is granted on law itself: “for the objectivist theory of law the concept of law is identified with that of international law and for that very reason is at the same time a moral concept.”⁷²⁵ As seen in Held, Kelsen too registers a vision in Kant’s perpetual peace through a coming together of all states under a ‘world federal state.’

Kelsen however paradoxically requires that, since state sovereignty is a temporal category to be surpassed, primacy should be given to the criminal punishment of violators of international law by the courts of international law. For Kelsen, such a court of law for the punishment of war crimes works only if the war’s victors allow themselves to be judged by the same standards as the defeated. Only then, he says: “the legal nature – that is, the generality – of the punitive norms and the very idea of international justice be saved.”⁷²⁶ Here, Kelsen implies that juridical equality and legitimacy are still elementary for the progress to a world federal state able to ‘justly’ punish transgressions. Juridical equality here validates the system of global justice. Ultimately, the foundation of international law’s political authority is equal sovereignty. It is therefore difficult to imagine how international law will overcome its deep-rooted relation with sovereignty, since the vision of international justice presupposes a commitment to juridical equality which itself necessitates a commitment to state sovereignty. To return back to the point, what these cosmopolitan accounts share, both Held’s and Kelsen’s, is an ‘ideal’ system of liberal international law, involving a linear process of historical thinking and towards the gradual disappearance of state sovereignty. However, it is a vision which in order to be made realizable, forces denial of international law’s foundational violence and amnesia of its exclusionary and instrumental past. Such a vision deposits its faith in a linear historical process, which looks always towards a ‘bright’ future but denies its ‘dark’ past. Furthermore, its juridico-moral framework reproduces the problem it wishes to

⁷²⁴ For a critique on Kelsen’s legal cosmopolitanism as ‘Neo-Kantianism’ see Danilo Zolo. (1998). Hans Kelsen: International Peace Through Law, *European Journal of International Law*, Vol. 9, pp.306-324.

⁷²⁵ *Ibid.*, p. 310, citing Kelsen.

⁷²⁶ *Ibid.*, p. 319.

overcome, namely state sovereignty. Ultimately, the individualism of states is fundamental to this vision. As R. B. J Walker notes “in some very important respects cosmopolitanism must be read as a constitutive aspect of the problems that many of those attracted to cosmopolitanism seek to address.”⁷²⁷

Vaughan-Williams identifies three limits to the cosmopolitan promise: first, a teleological view of history; second, a Eurocentrism masqueraded as universalism; and third, a continued reliance on the sovereignty of the state.⁷²⁸ There is indeed as William Smith proposes a differential treatment of each case of humanitarian emergency among ‘cosmopolitans’.⁷²⁹ Accordingly, the divergence of cosmopolitan accounts over the issue of humanitarian intervention should be highlighted. Yet, the problem remains one in which cosmopolitanism is treated as a regulative ideal in the unavoidable absence of certainty over the ultimate decision to use force and of the ultimate political nature of such decisions. Vaughan-Williams, who draws on Derrida’s concept of responsibility, states that the ethic of hospitality, which we find in Kantian thinking and its reinvention in contemporary cosmopolitanism, is a conditional ethic. Not only because the state remains at the heart of its conceptualization but also because as Derrida reminds as

“any agenda or programme designed to extend hospitality to others constitutes an attempt to provide an ethical generality in world politics that is doomed to failure. As soon as a course of action is taken to try to assure or guarantee the ‘equal and legitimate rights of others’...some others somewhere else in the world are always betrayed.”⁷³⁰

In addition, drawing from the analysis of Derrida’s account of responsibility, a regulative ideal can be seen as a shelter (or phantasy) of certainty, mastery and self-assurance against the anxiety and the ‘fear and trembling’ of the scene of address.

⁷²⁷ In Nick Vaughan-Williams. (2007). *Beyond a Cosmopolitan Ideal: the Politics of Singularity*, *International Politics*, Volume 44, pp. 107-124, p. 112.

⁷²⁸ *Ibid.*, p. 111.

⁷²⁹ William Smith. (2007). Anticipating a Cosmopolitan Future: The case of Humanitarian Military Intervention, *International Politics*, Vol. 44, pp. 72-89, p. 72.

⁷³⁰ Vaughan-Williams, *op cit.*, p. 118.

From anxiety to control: disciplinary affinities and legal rationality

The above account is not and cannot stand as a critique of Kantian metaphysics or Kantian morality. What is noteworthy from Held's or Kelsen's account however, is the apolitical and neutral engagement - even a sort of 'existential' investment - in the revival of Kantian metaphysics and his legacy to defend and support the liberal cosmopolitan project. In relation to legal cosmopolitans, such as Kelsen, Kantian metaphysics and the dream of perpetual peace is also used to defend international law's project in the absence of such material reality. The dream not only works as a way to transfer normative questions in relation to protection practices *in a non-cosmopolitan present*, but such an intellectual investment provides a sense of comfort and of certainty that materially constitutes a self-assured self and a coherent international political/legal subjectivity. With the use of relevant critical legal literature, such a similar intellectual investment with regards to the celebration from the part of some international lawyers of Vitoria's ecumenical humanitarianism and internationalism, has already been explored and challenged in Chapter 2. Likewise, J. D. Haskell notes and explores "the almost fetishistic hold of Grotius on the imagination of international lawyers"⁷³¹, citing Hersch Lauterpacht as an example. Haskell argues, that "Lauterpacht adopts the traditional narrative that Grotius 'secularized' the law of nations, which in turn, provides for the groundwork claim that international law is a detached process of peaceful resolution"⁷³². Such a treatment of Grotius as some 'avant-garde of secular jurisprudence' "is to suppress the overall tenor of his writings, as well as to miss strong thematic linkages between his 'secular' work and the 'profoundly Christian' traditions of the protestant humanists and late medieval Catholic jurists".⁷³³ Whereas Haskell uncovers a different story that reveals the exclusion of non-Christian peoples from the sphere of natural law or a legitimizing

⁷³¹ John D. Haskell. (2011). Hugo Grotius in the contemporary memory of international law: secularism, liberalism and the politics of restatement and denial, *Emory International Law Review*, Vol. 25, pp. 269-298, p. 270.

⁷³² *Ibid.*, p. 282.

⁷³³ *Ibid.*, p. 274.

narrative for trade interactions and colonial exploitation. This kind of intellectual investment reveals an anxiety to work with and within political subjectivity and complexity. Amidst this anxiety of being, international lawyers tend to treat Grotius as either an advocate of “liberal religious tolerance and formal equality” by obscuring “the historically exclusionary origins of the Western liberal state”, or denounce “his theory as self-serving justifications of empire.”⁷³⁴ Instead, Haskell suggests that international lawyers should treat Grotius as a politically situated figure. According to Haskell: “rather than shy away from the partisan nature of Grotius’s convictions, we might instead accept them as the very conditions of emancipatory politics”⁷³⁵ and to “proclaim a fidelity to truth without apology.”⁷³⁶

Matthew Nicholson points out that we can observe a more general tendency in international law, which succumbs in the comfortableness of the form and methodology of ‘past texts’.⁷³⁷ In doing so, those spaces of political subjectivity that need to remain open and negotiable are being foreclosed. For Korhonen and Selkälä legal cosmopolitanism, as it relates to conceptions of international responsibility, is being primarily defined by its ‘formalistic’ approach to codes of state liability.⁷³⁸ In this group, Korhonen and Selkälä include the more ‘pure’ or ‘conservative’ approaches of international law, figures the likes of Kelsen, to those more ‘progressive’ the likes of Koskenniemi or Klabbers.⁷³⁹ According to Korhonen and Selkälä there are certain physiognomies that connect this approach with respect to ‘theorizing responsibility’. The most prevalent ones are

⁷³⁴ *Ibid.*, p. 297.

⁷³⁵ *Ibid.*, pp. 296 to 297.

⁷³⁶ *Ibid.*, p. 298.

⁷³⁷ Matthew Nicholson. (2016). Walter Benjamin and the Re-Imagination of International Law, *Law and Critique*, Volume 27, pp. 103-129.

⁷³⁸ Outi Korhonen and Toni Selkälä. (2016). Theorizing responsibility, in Anne Orford and Florian Hoffmann, (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, see ‘Responsibility Formalism: Primacy of the law’, for an example of such international responsibility, approach and way of thinking see Crawford, J., and Watkins, J. (2010). International Responsibility, in S. Besson, and J. Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, pp. 283-298.

⁷³⁹ See also Martii Koskenniemi, Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization, *Theoretical Inquiries in Law*, Vol. 8, Issue 9, 2006, pp. 9-36, Koskenniemi provides for a ‘progressive’ reading of Kant’s moral philosophy and of ‘constitutionalism’ and Jan Klabbers. (2013). Towards a Culture of Formalism? Martii Koskenniemi and the Virtues, *Temple International and Comparative Law Journal*, Vol. 27, Issue 2, pp. 415-433, Klabbers supports Koskenniemi’s culture of formalism.

individualism and state-centrism.⁷⁴⁰ The crude categorization here might do injustice to the work of Koskenniemi as a whole. Koskenniemi's 'culture of formalism' is best seen as an inquiry and critical investigation into the culture of international legal thinking more broadly and as such he has been critical of this culture in more than one occasion.⁷⁴¹ Nevertheless, Korhonen and Selkälä observe that the 'formalist project', to which they include both Kelsen and Koskenniemi, "sets up the cosmopolitan peace project on the formal morality of law's equity and reciprocity, in which responsibility for one's transgressions is systematically given by virtue of the concept of the law itself."⁷⁴² According to Korhonen and Selkälä, the formalistic approach in this sense does not consider how the theorizing of responsibility includes for example cultural and 'socio-economic' considerations. The concept of legal state liability takes these considerations as 'non-issues'.⁷⁴³ The teleological character of the cosmopolitan ideal, the idea of the cosmos in progress towards an emancipatory telos of perpetual peace sustains the need for objective legal certainty and of the lawyer for epistemological certainty. Therefore, the cosmopolitan ideal works perfectly with individual legal accountability. The need of the legal form for the certainty of a corporeal body with a structure of command to account for violence and for justice is sustained by an idea of the state or of the individual as sovereign. The use of professional language and the retreat to established methods is rooted in an anxiety to control an increasingly networked, multifaceted, digital reality with multiple sites of command and systemic contradictions and to influence state practice. According to Nicholson:

"the more international law is confronted with a complex and fragmented reality of competing values and complex choices the more it retreats into conservative self-assurance. To fully explore questions of nature and method would risk the future of the

⁷⁴⁰ Korhonen and Selkälä, 2016, *op cit.*

⁷⁴¹ For example his texts on international criminal law and individual responsibility, as those used in the previous chapter (3), critically assess the individualism of international criminal law against the structural condition of mass crimes, more generally see Koskenniemi, *The Gentle Civilizer of Nations*, *op cit.*

⁷⁴² Korhonen and, Selkälä *op cit.*, p. 2.

⁷⁴³ *Ibid.*, p.3.

discipline, so it is (apparently) preferable to avoid such questions and keep on using the 'toolbox'.⁷⁴⁴

Nicholson, quoting Benjamin, argues that international law should always be “*re-imageined*” as an “idea” – “something constantly remade to represent present reality.”⁷⁴⁵ Building upon Benjamin’s critique of violence and his concept of ‘pure means’ of representation, international law should be “a means of presenting an image of what is, what was, and what should be to an audience.”⁷⁴⁶ For Nicholson international lawyers should pursue *representation rather than control* and adapt something of a poet’s anxiety, who in writing that something different into being they bring that new into reality. As discussed, in the previous chapter, the modern feature of social organization that is the division of labour and its attendant issue of role responsibility recurrently becomes a pattern for the disappearance of collective and social responsibility. In contrast:

“Re-imagination disperses law’s violence, removing the possibility of playing the ‘role’ of the lawyer, by abandoning the notion that there are particular forms or methods which only lawyers understand. We are all international lawyers because representation is all there is – there is no defined form, method, or ‘role’.”⁷⁴⁷

In this sense, the international lawyer is not someone who simply represents the legal method but is primarily a critical reader or a ‘social theorist’ who articulates and represents the conditions and limits of present materiality and human existence in view of the law.

The conservative use of a ‘toolbox’, for example on the use of force or the use of conventional diplomatic language, might forbid, as Gerry Simpson notes, “more emancipatory or dissident ‘forms of life’ or ways of going about things – or just closes off a bit of our humanity.”⁷⁴⁸ A turn to another language is a turn to understanding things differently or of organizing thinking otherwise. In contrast to rational or formalistic approaches to international law, Simpson looks at ‘the

⁷⁴⁴ Nicholson, *op cit.*, p. 104, Nicholson establishes this point in reference to the ILC study on fragmentation. The ILC did not question the impact of its own methodology on the study of fragmentation; the apparent problems were to be dealt with already established techniques.

⁷⁴⁵ Quoting Benjamin, Nicholson, *op cit.*, p. 106.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Ibid.*

⁷⁴⁸ Gerry Simpson. (2015). The Sentimental life of International Law, *London Review of International Law*, Volume 3, Issue 1, pp. 3–29, p. 6

sentimental character of international law'. Simpson suggests a poetic turn to writing and thinking international law, a turn also towards, one could say, discomfort and complexity against 'excess' and 'simplicity'.⁷⁴⁹ According to Simpson, "the whole idea of an international law (responsibility to protect, human rights interventions) of humanitarianism is built around such distinctions", of good and evil, perpetrators and victims.

Such moral simplicity overshadows structural violence and structural conditions.⁷⁵⁰ One might rightly claim that a turn to 'the sentimental life of international law' might exacerbate even more the excess of moral simplicity. Simpson is arguing "a sort of boiled down, unillusioned sentimental life is what we might be after, sentiment without sentimentality. A sentimental life that takes the emotional pulse of the work we do but allies it to an economy of irony that is at the same time detached but involved."⁷⁵¹ Nicholson's and Simpson's theses have particular valence in relation to the responsibility to protect concept. Driven by an anxiety to influence state practice and to control the reality of the 'void' of international law and of political subjectivity, it can be argued, that the authors of the concept, retreated to the familiar language of just war theory and to the language and formalism of state responsibility as of necessity. Their ultimate goal was to produce 'consensus' and therefore previous formulations and languages appeared in this light more effective. In doing so, the authors failed to explore how 'sites of irresponsibility' arise in cases of protections, or, for example, how discourses of individual responsibility overshadow structural complicity. An alternative practice would be to explore and expose those 'sites of irresponsibility' and to treat them as real living conditions. The results of that exploration might have been closer to the real material conditions of international law. As such, it is an attempt to curtail the difference between a fully pondered and utopic idea of international law and international law's reality and present.

⁷⁴⁹ *Ibid.*, p. 28.

⁷⁵⁰ *Ibid.*

⁷⁵¹ *Ibid.*, p. 26.

The 'critical' response in IR

Nicholson's and Simpson's above theses echo the insistence of post-structural IR scholars to "try and exploit networks of communication that reach beyond the traditional limits of disciplinary affinity."⁷⁵² International lawyers and academics struggle and debate on how to approach international law better to make it relevant. This has to do with the "idea" of international law, that includes both what international law *represents* and how it *materializes*.⁷⁵³ In this light, international law has been experiencing a 'crisis of representation'. According to Richard Ashley and R. B. J Walker:

"In crisis, subjects and objects appear not as sources of meanings that might be signified or represented in words but as open texts that are ever in the process of being inscribed through a hazardous contest of representations. The subject is deprived of self-evident identity... In a crisis of representation...every answer is immediately received as but one more groundless representation, no more and no less sincere or legitimate than any other."⁷⁵⁴

The 'void' of international law is a space that is simultaneously the terrain of hope and of despair, of 'utopia' and 'apology', of futurity and closure. It is also the space that the promise of cosmopolitanism occupies. In such a crisis the question becomes one of how to fill the void and therefore different dispositions to action emerge "amidst the undecidable ambiguities of space, time, and identity encountered here and now."⁷⁵⁵ It is not only international law that is occupied by such a 'void'. Post-structuralist IR theorists are concerned with the notion of 'sovereign' capacity more broadly. If we understand sovereignty and sovereign agency as not confined to a stable identity or limited by juridical exigency, then 'sovereignty' reveals a 'performative' and political nature - it can be best seen as an act of self-constitution. However, how is this conceptualization better or more

⁷⁵² Richard K. Ashley and R. B. J Walker. (1990). Conclusion: Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies, *International Studies Quarterly*, Vol. 34, No. 3, pp. 367-416, p. 411, see also James Der Derian and Michael Shapiro (eds.). (1989). *International/Intertextual Relations: Postmodern Readings in World Politics*, Lexington Books.

⁷⁵³ Martti Koskeniemi. (2014). What is International Law For?, in Malcolm D. Evans (ed), *International Law*, Oxford University Press, pp. 89-114.

⁷⁵⁴ Ashley and Walker, 1990, *op cit.*, p. 379.

⁷⁵⁵ *Ibid.*, p. 380.

helpful with regards to thinking about global ethical responsibility and humanitarian practice?

According to Ashley and Walker:

“the problem of sovereignty is profoundly paradoxical. Accenting the root, we may say that it is *profound* in the sense that it is preoccupied with the problem of foundation: a fundamental principle, a supporting structure, a base on which society rests, a fund of authority capable of endowing possibilities, accrediting action, and fixing limitations.”⁷⁵⁶

Ashley and Walker are concerned not only with state sovereignty but also with the “‘objective reality’ of a human nature that a ‘sovereign man’ might represent.”⁷⁵⁷ It is thus not only the concept of the sovereignty of state that fails to materialize in present reality but the idea of ‘sovereignty’ broadly speaking, of rationality and of self-assurance: “every semblance of sovereign subjectivity is exposed as but a projection of desire, groundless and powerless in itself.”⁷⁵⁸ An undecidable and groundless ethical relation to the other without the certainty of sovereign subjectivity opposes the desire of the lawyer and of legal judgment for certainty and legal accountability. As discussed in the previous chapter, legal certainty and accountability necessitates an identifiable subject of responsibility and/or structure of command that can be connected to a specific action (or omission) for which it can be held accountable and thus be punishable.

Legal responsibility requires a strict identity on the part of the holder of responsibility because it demands a physical person or corporeal body to hold accountable for the failure of discharging its responsibilities. Therefore, for the lawyer and the discipline of international law a ‘crisis of representation’ that is also a crisis of sovereign subjectivity is better to be dealt with outside of the discipline itself. The examples of ‘disciplinary affinity’, explored at the beginning of this section highlight a denial which legal cosmopolitanism suffers from. This denial is manifested in the patterns of reading, of writing and comprehending “a discipline’s ‘referent reality’ as an objectively given external domain that is not

⁷⁵⁶ *Ibid.*, p. 382.

⁷⁵⁷ *Ibid.*, p. 413.

⁷⁵⁸ *Ibid.*

only independent of 'our' knowing but also capable of authorizing and limiting what 'we' can validly think and say about our world."⁷⁵⁹ In their anxiety to control and to maintain, international lawyers embraced a progressive history of instrumental reason from the Stoics to Kant and to a self-assured concept of responsibility. For Ashley and Walker, this kind of reading and embracing of history is a 'memorializing' reading, which speaks in a 'religious register of desire'.⁷⁶⁰ In the words of David Kennedy, we perhaps need to think humanitarian responsibility as critique. "We have mistaken", he argues, "a pragmatic vocabulary of instrumental reason for responsibility. The idolatry of tool disguises itself as wisdom of the long run. But let us assess those long term promises with cold and disenchanted eyes."⁷⁶¹

Derrida's deconstruction and his philosophy, along with the work of critical theorists such as Martin Heidegger, Michel Foucault, Emmanuel Levinas, Jean-Luc Nancy and Judith Butler among others,⁷⁶² have influenced an important number of international relations academics, who produced a voluminous literature at the end of 1980s and during the 1990s. These international relation theorists sought to provide an understanding of ethics, politics and foreign policy⁷⁶³ beyond conventional paradigms in international relations. The end of Cold War bipolarity 're-moralised' and 're-vitalised' the influence of liberal institutions of governance; that 'excess of power' planted the seeds of a 'disciplinary crisis' in international relations or, rather, it made such crisis much more visible. Arguably, it is not a coincidence that such a literature and debate about the nature, values, identity and agency of such institutions, including the

⁷⁵⁹ *Ibid.*, p. 399.

⁷⁶⁰ *Ibid.*, pp. 376 to 386.

⁷⁶¹ David Kennedy. (2006). Reassessing Humanitarianism, in Anne Orford (ed.). *International Law and its Others*, Oxford University Press, pp. 131 -155, p. 153.

⁷⁶² See Jenny Edkins and Nick-Vaughan Williams (eds.). (2009). *Critical Theorists and International Relations*, Routledge.

⁷⁶³ See for example a dialogical understanding of international relations, which draws on Mikhail Mikhailovic Bakhtin and his notion of transgression, Xavier Guillaume. (2002). Foreign policy and the Politics of Alterity: A Dialogical Understanding of International Relations, *Millennium: Journal of International Studies*, Vol. 31, No. 1, pp. 1-26.

sovereign state and sovereign agency, emerged during that period.⁷⁶⁴ Just as critical legal theory, critical or ‘post-structural’ international relations seek to provide investigations of our ‘schemas of intelligibility’ and of conventional normative understandings and to challenge the ontological essentialism that pervades positivist and epistemological accounts of international relations. Intelligibility is to be understood here as those epistemic ideas or beliefs on the nature of life “that establish domains of the knowable.”⁷⁶⁵

David Campbell observes that the most criticized aspect of Derrida’s deconstructionist logic is “undecidability”.⁷⁶⁶ For that Campbell asserts that Derrida’s concept of responsibility is not to be understood as a *carte blanche* to an ‘anarchical irresponsibility’, it does not deny responsibility, “the very notion of undecidability is the condition of possibility for a decision.”⁷⁶⁷ Complementing the Derridean notion of undecidability with the Levinasian ethic of the other-regard, Campbell contends that there is indeed a ‘political’ thesis in Derrida’s account of responsibility. It is an account that is ‘antitotalitarian’ and “gives its politics a particular quality”; “deconstruction’s affirmation of alterity deterritorializes responsibility, and pluralizes the possibilities for ethics and politics over and beyond (yet still including) the state.”⁷⁶⁸ For example, Campbell in *Writing Security* incorporates into the study of foreign policy and international relations the ethical and philosophical inquiry of the self/other relation and provides an account of the state [the US] as a narrative and representational structure.⁷⁶⁹ Hence, the state is seen primarily as a historically and discourse situated ‘self’, whereby its identity comes into being in relation to difference and otherness. Such an identity is always situated in a never-ending process of

⁷⁶⁴ See also R. B. J Walker. (1993). *Inside/Outside: International Relations as Political Theory*, Cambridge University Press, Michael Dillon. (2013). *Deconstructing International Politics*, Routledge.

⁷⁶⁵ Judith Butler. (2010). *Frames of War: When is Life Grievable?*, Verso Books, p. 9.

⁷⁶⁶ David Campbell. (1994). The Deterritorialization of Responsibility: Levinas, Derrida, and Ethics, *Alternatives: Global, Local, Political*, Vol. 19, No. 4, pp. 455-484.

⁷⁶⁷ *Ibid.*, p. 470.

⁷⁶⁸ *Ibid.*, p. 478.

⁷⁶⁹ David Campbell. (1992). *Writing Security: United States as Foreign Policy and the politics of identity*, University of Minnesota Press.

becoming. Therefore, such analyses turn to the inter-subjective processes of global ethical life. According to Campbell:

“states are never finished entities; the tension between the demands of identity and the practices that constitute it can never be fully resolved, because the performative nature of identity can never be fully revealed. This paradox inherent to their being renders states in permanent need of reproduction: with no ontological status apart from the many and varied practices that constitute their reality, states are (and have to be) always in a process of becoming. For a state to end its practices of representation would be to expose its lack of prediscursive foundations; stasis would be death.”⁷⁷⁰

Similarly, Cynthia Weber develops a notion of ‘performative states’ whereby sovereign identity and agency are being ‘dislocated’ and ‘decentered’ in an attempt to move “beyond traditional definitions of sovereignty (e.g. sovereignty is status or sovereignty is like a basket).”⁷⁷¹ As Weber suggests: “This kind of analysis ‘denaturalizes’ the meaning of the state and its relationship to sovereignty. Foreign policy speeches, cables, press conferences etc. may also be analyzed as performative enactments of a state’s sovereignty.”⁷⁷² To develop her notion of performative states, Weber draws on Judith Butler’s notion of performative gender. The notion of ‘performativity’ will be discussed later. The point of using both Campbell and Weber here is to show how an uncertain and unfixed sphere of political subjectivity enters the performative circuits of international relations, opening up to a wider and complex network of inter-subjective and intra-subjective constitution. Such a way of thinking tends to apprehend the categories, collectivities and collective practices of international actors and institutions as “impersonations” or representations and their acts as the “proliferation of performances the very moments when representation seems to fail. Moments of international military intervention illustrate this.”⁷⁷³

A more recent study inspired by the deconstructionist logic of Derrida and his paradoxical concept of responsibility is that of Dan Bulley. Bulley provides a ‘critical post-structuralist reading’ of British and EU foreign policy. He dissects

⁷⁷⁰ Campbell, 1992, *op cit.*, p. 11.

⁷⁷¹ Cynthia Weber. (1998). Performative States, *Millennium Journal of International Studies*, Vol. 27, No. 1, pp. 77-95, p. 92.

⁷⁷² *Ibid.*

⁷⁷³ *Ibid.*, p. 93.

British (from 1997 to 2007) and EU foreign policy (from 1999 to 2004) and reads foreign policy as ‘text’ in an attempt to show how “their logic undermines its own basis.”⁷⁷⁴ While reading the texts of British and EU policy, Bulley draws attention to the construction of subjectivity, the subjectivity of a ‘we’ able to carry out an intervention and the subjectivity of a ‘them’ or an ‘other’ that is to receive help.⁷⁷⁵ This understanding is familiar to how this thesis comprehends the ‘rhetoric’ and effects of the ethical framework of the responsibility to protect, how and what kind of global ethical responsibility the responsibility to protect concept ‘communicates’. It is this primary understanding that pushed the thesis in an exploration of its juridico-moral framework and the responsibility (‘sites of irresponsibility’) within the responsibility to protect concept. Chapter 2 and 3 are results of such an investigation, while Chapter 1 focuses on its legal foundation and legal debates which foregrounded the concept. Drawing also on Derrida’s paradoxical responsibility, Bulley notes that *any* ethical relation is “neither possible nor impossible” but is rather ‘undecidable’ and political – “a continuing-to-live-with undecidability”.⁷⁷⁶ Bulley argues that the “*politics* of ethics”, including the notion of responsible practice, “are marked by irresolvable but *necessary* contradictions.”⁷⁷⁷ Therefore, the possibility of our ethical relation, as noted by Bulley, can only be ‘*negotiated*’ contextually in the face of the encounter and of the call for responsible protection. According to Bulley, the ‘undecidability of ethical concepts’ produces two obvious responses:

“either acknowledge them and resolve that an ethical foreign policy is *impossible* and perhaps even dangerous in its impossibility; or, ignore the contradictions and paradoxes and act *as if* we know who/what ‘we’ ‘are’, what responsibility and hospitality mean and how they can be enacted. Both these responses are rejected as *fundamentally* unethical: the first because it acknowledges itself as such; the second because, as Derrida says of responsibility, any inadequate thematisation of the ethical is itself an irresponsible, unethical thematisation.”⁷⁷⁸

An important element of Bulley’s post-structural critique is that we cannot know whether “in reality” policy makers and diplomats were indeed attempting to act

⁷⁷⁴ Dan Bulley. (2009). *Ethics as Foreign Policy: Britain, the EU and the Other*, Routledge, introduction.

⁷⁷⁵ *Ibid.*, Chapter 2 and 3, see also Dan Bulley. (2010). The politics of foreign policy: A responsibility to protect whom?, *European Journal of International Relations*, Vol. 16, Issue 3, pp. 441-461.

⁷⁷⁶ Dan Bulley, 2009, *op cit.*, Chapter 5: Negotiating Undecidability, the application I have used to read the book unfortunately did not include page numbers.

⁷⁷⁷ *Ibid.*, p. introduction.

⁷⁷⁸ *Ibid.*, Chapter 5.

ethically in each crisis. In other words, the intentions with regards to humanitarian practices are not something we can ever completely be certain of. Yet, what we can know is how such an ethical relation to otherness is represented. As Bulley argues, “these foreign policy texts rely on the possibility of a collective subject of ethical foreign policy, they require a ‘we’, an ‘our’, an ‘us’ which can act ethically”.⁷⁷⁹ Therefore, juridico-moral frameworks such as the responsibility to protect concept if read as ‘texts’ reveal acts of self-constitution and of identity and entail particular views of human and political subjectivity. As a result, it is possible to identify what kind of global ethical responsibility is represented or advocated, what pattern of thinking perhaps leads to such representation and ethical relation and who is being represented and how. As explored in the previous section, such an analysis produces *discomfort* for the international lawyer, the liberal cosmopolitan and the discipline of international law itself because it reveals a networked and multifaceted world underpinned by inter-subjective and intra-subjective recognition, which challenges the predilection for certainty and self-assurance. In the following sections, drawing on Butler’s idea of ‘*Scenes of Address*’ as spaces of constitution and recognition (misrecognition), I attempt to illustrate how and what kind of global ethical responsibility is ‘negotiated’ or communicated through the responsibility to protect concept and what is to be gained by such an analysis.

c. ‘Scenes of Address’: ‘performative’, mediated and uncertain subjects

In *Giving an Account of Oneself*, Butler elaborates a post-Hegelian account of recognition through the work of Adriana Cavarero which grounds the social in the dyadic encounter.⁷⁸⁰ She uses Laplanche’s psychoanalytic work to expose the limits to understanding and narrating the self and builds upon Foucault’s later theory of subject formation, Adorno’s ‘human-inhuman’ dialectic of ethical dispositions and theory of responsibility, to underline that *ethical action*

⁷⁷⁹ *Ibid.*, introduction.

⁷⁸⁰ Judith Butler. (2005). *Giving an Account of Oneself*, Fordham University Press, Butler’s body of work has consistently provided for a ‘grammar’ of human subjectivity that is organized around the politics of ‘performative’ agency.

necessitates an avowal of error “as constitutive of who we are.”⁷⁸¹ Even though, as Butler argues, Foucault and Adorno make different claims on Kant’s use and effect of moral reason, they both refer to Kant to establish a common point. According to Butler, “Although Adorno faults Kant for not recognizing error as constitutive of the human and Foucault lauds him for apprehending precisely that, they both concur on the necessity of conceiving the human in its fallibility.”⁷⁸²

Butler draws on Foucault’s notion of ‘self-criticism’⁷⁸³ to show that the question of ethics emerges precisely at the limits of our schemas of intelligibility, where one is at the limits of what one knows yet under the demand to be addressed and to address. This ethical predisposition fights at several fronts at the same time. A fear of an unknown other both within and outside the self, establishes an ongoing reflection on particular and universal demands of responsibility - of singular and collective – and pursues *an ongoing inquiry* between oneself and schemas of intelligibility. Butler remarks: “I find that my very formation implicates the other in me, that my own foreignness to myself is, paradoxically, the source of my ethical connection.”⁷⁸⁴ It seems that in such an ethical relation one even risks oneself and suffers an ongoing constitutive loss.

Similar to Foucault’s ‘self-criticism’, Adorno by introducing the dialectical inversion of the ‘inhuman-human’ opposes an individualistic and a ‘regulative’ ethics, pushing towards a politics, or an ethics, of responsibility than a politics of conviction. Adorno does not define the human for us but instead grounds the notion of the human in a “double movement, one in which we assert moral norms at the same time as we question the authority by which we make that assertion.”⁷⁸⁵ The inverse dialectic in Adorno seeks to counter certain presumptions that fixate normative categories into coherent and self-sustained

⁷⁸¹ *Ibid.*, p. 111.

⁷⁸² *Ibid.*

⁷⁸³ *Ibid.*, p. 24, as Butler notes Foucault did not make room explicitly for the dyadic scene of self and other “perhaps because it cannot describe adequately the social workings of normativity that condition both subject production and inter-subjective exchange.”

⁷⁸⁴ *Ibid.*, p. 84.

⁷⁸⁵ Butler, 2005, *op cit.*, p. 105.

subjects. According to Butler, the dialectical inversion of Adorno's 'inhuman' dimension:

“facilitates an immanent critique of the human and becomes a trace or ruin through which the human lives on (fortleben). The “inhuman” is also a way of designating the way social forces take up residence within us, making it impossible to define ourselves in terms of free will.”⁷⁸⁶

In this sense, ‘we’ embody the inhuman.⁷⁸⁷ It is an understanding that challenges the ‘embedded’ political subjectivity and ‘humanness’ of cosmopolitanism.

Butler uses Levinas and Laplanche to underline both the primacy of the other and our vulnerability. For Levinas the address of the other precedes any formation of the self. The Levinasian other makes an ethical demand that obliges ‘me’ to respond to a ‘face’, no matter what the other has done or who he is. Butler reads Laplanche to supplement Levinas and to emphasize not only the precipitating interruption of the self by the other, a ‘primary impingement’ and “from the start an ethical interpellation”⁷⁸⁸, but also a *non-narrativizable exposure* to the other. According to Butler, Levinas’s other emerges through a persecution and an accusation but Laplanche’s ego emerges through ‘enigmatic signifiers’ that the infant suffers from the adult world.⁷⁸⁹ In this light, the unconscious makes it difficult or even impossible to give a full account of oneself “not only because the body has a formative history that remains irrevocable by reflection, but because primary relations are formative in ways that produce a necessary opacity in our understanding of ourselves.”⁷⁹⁰

As Butler states:

“the very terms by which we give an account, by which we make ourselves intelligible to ourselves and to others, are not of our making... what we often consider to be ethical ‘failure’ may well have an ethical valence and importance that has not been adjudicated

⁷⁸⁶ *Ibid.*, p. 106.

⁷⁸⁷ *Ibid.*, p. 106 to 107.

⁷⁸⁸ *Ibid.*, p. 89.

⁷⁸⁹ *Ibid.*, p. 97, Laplanche believes that both Heidegger and Levinas failed to “decenter” all the way down human subjectivity, how norms and others instill their thoughts in our own which begins in our infantile experience.

⁷⁹⁰ *Ibid.*, p. 20.

by those who too quickly equate post-structuralism with moral nihilism.”⁷⁹¹

Can what binds us be our ‘opacity’ to each other? Or, that a sense of a ‘we’, or of an international self, can emerge by being grounded in our reciprocal recognition of the failure to fully give an account of ourselves? Butler sees primary vulnerability of both the ‘idea’ of a self-determining self, and the ‘idea’ or identity we inscribe upon the other through speech, as being a possibility for responsibility. Therefore, she attempts to ground an account of responsibility, which does not emerge through persecution, accusation or ‘bad conscience’ in the process of addressing the other. A self-certain self would also mean to condemn the other. In her own words, she “hopes to show that morality is neither a symptom of its social conditions nor a site of transcendence of them, but rather is essential to the determination of agency and the possibility of hope.”⁷⁹² Butler’s account of the formation of the subject and of ‘frames’ of recognizability complicates responsibility practices because, at first sight, it appears as if the subject has no capacity of moral agency and moral accountability. However, as Butler argues, “The ‘I’ is always *to some extent* disposed by the social conditions of its emergence.”⁷⁹³ Accordingly, it is only the subject’s critical deliberation upon the norms and their interpellations that opens the domain of ethical deliberation; “ethical deliberation is bound up with the operation of critique.”⁷⁹⁴ This understanding forms the crux of Butler’s account of how we can become accountable subjects. Butler argues that it is possible to ground a notion of personal and collective (social) responsibility that serves as a conception of ethics and of responsibility through a theory of subject formation that acknowledges the limits of self-understanding. It is an understanding that is sensitive to how subjects form identities within the particular moment of the encounter; who am ‘I’, ‘you’, ‘we’, or ‘they’ is a question that can be posed at the moment of encounter.

⁷⁹¹ *Ibid.*, p. 21.

⁷⁹² *Ibid.*

⁷⁹³ *Ibid.*, p. 31

⁷⁹⁴ *Ibid.*, p. 8.

The question of who am 'I', 'we', or 'they' opens up a space of ethical reflection and legal/political deliberation. Now, situating the question in the moment of decision and in the frame of an event with regards to large scale loss of life while simultaneously thinking through a theory of subject formation that acknowledges the limits to self-understanding, has the potential to break with fixed identities and programmatic ethics, empower forms of political subjectivity and allow/let subjects speak and be heard. In other words, the encounter as a moment of interaction can also be seen as a process of creating new understandings of self and Other or community and Other(s), as well as be useful in taking responsibility for our practices and role. To understand in this sense "what we are doing when we practice, write and think about international law".⁷⁹⁵ Identities are understood here as depended variables to the process of interaction per se. In this sense, the question of who am 'I', 'we', 'you' and the ethical relation to the 'I', 'you', 'they', disrupts both identity (the self, Other, including communal understandings of self and Other) and the scene and structure of recognition and allows it to be recasted in the moment of decision. To be sure, the 'I' can be the international lawyer, the academic, the UN-worker, the official, the discourse-situated subject. The 'you' can be the politically-situated Other. The 'we' can be the dominant notion of an 'international community'. Hence, to disrupt such identities will be to engage in critical deliberation on their identity, relation to social norms and ethical response. The question also highlights the importance of theorising inter/intra subjectivity to understand notions of responsibility, and the opposite, to theorize notions of responsibility to understand inter/intra subjectivity.

It is this question that grounds the possibility of responsibility since, and if, the self can deliberate on its social conditions of emergence and the dominant ethical order. For Butler the demand for the continuous maintenance of self-identity operates as ethical violence and that "suspending" such a demand for both self

⁷⁹⁵ Sundhya Pahuja. (2013). Laws of Encounter: a jurisdictional account of international law, *London Review of International Law*, Vol. 1, Issue 1, pp. 63-98, p. 66.

and other is a condition for ethical possibility.⁷⁹⁶ For Butler, the Nietzschean account of how we come to be morally responsible persons reduces morality to bad conscience and generalizes the scene of punishment.⁷⁹⁷ Although the Nietzschean account, says Butler, has played a crucial role in Foucault's disciplinary society, Foucault does not reduce morality to bad conscience. For Foucault "reflexivity emerges in the act of taking up a relation to moral codes" and this reflexivity "does not always rely on the violence and prohibition and its internalizing effects."⁷⁹⁸ According to Butler, Adriana Cavarrero provides for an Arendtian (and Levinasian) conception of the social by supplying to the act of recognition a direct question that is addressed to the other - "Who are you?".⁷⁹⁹ In doing so, Cavarrero contradicts the Nietzschean view of morality by emphasizing that we are "of necessity, *exposed* to one another in our vulnerability" and thus introducing to the 'foreclosing' Nietzschean account *another* scene of address, the impossibility of the 'I' without the other.⁸⁰⁰ According to Butler, Cavarrero unfolds a scene of recognition that begins from the dyadic encounter and moves to the social to ground the social in the dyadic.⁸⁰¹ By giving emphasis to the question of the 'you', Cavarrero contradicts positivist and individualistic ethics: "The you is ignored by individualistic doctrines, which are too preoccupied with praising the rights of the *I*, and the 'you' is masked by a Kantian form of ethics that is only capable of staging an *I* that addresses itself as a familiar you".⁸⁰² Yet, Butler argues, neither 'singularity' can tell a complete narrative of the self for which it is accountable or give a complete account of the self. Nor, in the same light, can 'precariousness' itself be properly or fully recognized.⁸⁰³ Therefore, what is here proposed is that before we proceed into a 'theorizing of responsibility' we need to acknowledge a kind of violence in the heart of ethics. What Butler here suggests is that considering a

⁷⁹⁶ *Ibid.*, p. 42.

⁷⁹⁷ *Ibid.*, p. 15.

⁷⁹⁸ *Ibid.*, p. 16. For an alternative take on Foucault's concept of human agency and of responsibility in contrast to Butler, see Andrew Schaap. (2000). Power and Responsibility: Should We Spare The King's Head?, *Politics*, Vol. 20, Issue 3, pp. 129 – 135.

⁷⁹⁹ *Ibid.*, 31.

⁸⁰⁰ *Ibid.*, p. 32

⁸⁰¹ *Ibid.*, p. 31.

⁸⁰² *Ibid.*, p. 32.

⁸⁰³ Butler, 2010a, *op cit.*, p. 13.

‘politics of singularity’ is fruitful, yet such ‘politics’ should be grounded in the limits of one’s self-understanding, including a collective sense of self-understanding.

Butler’s account can be placed within an emerging discourse of an ‘ethics of recognition’ that builds primarily upon the Hegelian philosophical system.⁸⁰⁴ Hegel’s central philosophical argument, from which post-Hegelian theories of recognition emerge, take the struggle or process for mutual recognition with another as elementary to the constitution of the inter-subjective self. Hegel’s theory of recognition occurs within three central spheres of ethical existence: in the family, in civil society, and in the state. The self develops consciousness through mediation and relation to these central spheres in an effort to gain independence. As it relates and mediates with the public realm it “attains consciousness of universality through membership in the totality of the political order.”⁸⁰⁵ According to Kochi: “For Hegel, legal rights and legal personality are universals generated at a higher level of abstraction underlaid by inter-subjective recognition.”⁸⁰⁶ For Kochi:

“Through recognition, Hegel tries to show not only how moral and legal universals are produced through differing forms of relations and mediations, but further, that within the operation of recognition there resides a certain violence, a violence of misrecognition, negation, and alienation, which does not stand outside of ethics but occurs as a central part of it.”⁸⁰⁷

The subject not only recognizes but also misrecognizes, fails to recognize, and resists to extend recognition. Through this lens, the Hegelian subject is subjected to an ongoing process of recognition, situated in the divergences between the universal and the particular, the ethical order and the social, political and

⁸⁰⁴ The breadth of the thesis makes it impossible to note and dissect every post-Hegelian account, it seems however important to note the variety and depth of different resulting treatments of Hegel’s inter-subjective recognition; for a comprehensive overview of the discourse, contemporary analysis and a presentation of different post-Hegelian accounts, see Kate Shick and Patrick Hayden (ed.). (2016). *Recognition and Global Politics: Critical Encounters Between State and World*, Manchester University Press. For an exploration into the relationship of an ethics of recognition and different philosophical traditions of the ordering of war and of rights, see Tarik Kochi. (2010). *The Other’s War*, Routledge, important works on ‘recognition’ include, Charles Taylor. (1992) *Multiculturalism and the Politics of Recognition*, Princeton University Press, Axel Honneth. (1995). *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Polity Press.

⁸⁰⁵ Shick and Hayden, *op cit.*, Introduction.

⁸⁰⁶ *Ibid.*, p. 148.

⁸⁰⁷ Kochi, 2010, *op cit.*, p. 147.

economic organization of human life. The subject extends recognition but its recognition is limited by all those conditions, forms of social and political organization that while making recognition possible, at the same time disrupt recognition and the ethical relation. In this light, our social modes of organizing responsibility and how we perceive the whole architecture of global ethical responsibility and its institutions and practices including present and past modes of legally enforced irresponsibility and violence, for example unequal juridical and socio-economic relations, are conditions of misrecognition and of irresponsibility. The argument made here is that to not account for such sites or conditions, *not to expose and speak of those conditions in relation to practices of protection is to precisely jeopardize these practices*. According to Butler, the process of recognition transforms the 'I' endlessly, and in that process the self suffers some 'constitutive losses'.⁸⁰⁸ The self finds the 'I' "*outside one self*", is being 'dislocated' by recognition, "our capacity to respond to a face as a human face is conditioned and mediated by frames of reference that are variably humanizing and dehumanizing."⁸⁰⁹ Crucially then, the scene of recognition does not only include the dyadic encounter, the exchange is mediated and conditioned by the social conventions and all that is external to the dyadic.⁸¹⁰

'Scenes of address'⁸¹¹ can be imagined as topoi, places, *through* which and *in* which the self begins to articulate an account of itself. This 'scene' is significantly a 'space' of constitution and of process. It is also the 'place' within which and through which the subject experiences morality, the operation of norms (of law) and the story of the self through recognition. Therefore, the mediating processes of inter-subjectivity, that is language, law or indeed the economy of the market and of exchange for that matter, are crucial to the constitution of the subject. If I try to give an account of myself, the account depends on a structure of address that I find myself already within and that circumscribes the possibilities and

⁸⁰⁸ Butler, 2005, *op cit.*, p. 28.

⁸⁰⁹ *Ibid.*, p. 29.

⁸¹⁰ *Ibid.*, p. 27, Butler argues that in Hegel's *Phenomenology of Spirit* we can observe that for Hegel the dyadic exchange proves inadequate as a 'frame of reference'.

⁸¹¹ Uses the 'scene of address' or 'space of address' interchangeably to situate the process of being addressed and addressing an Other, see also in Butler, 1997, *op cit.*

political edges of my account. Recall for a moment Derrida's radical and hyperbolic notion of responsibility. We can see that both Derrida and Butler conceptualize an internal, and even unwilled, irresponsibility within the concept of responsibility. They both recognize a primary violence at the heart of ethics. For Derrida, as already discussed, every attempt of responsibility is constituted and maintained through some acts of exclusion. In the process of responsibility something else (as another conceptualization or an imponderable ethical relation) or other(s) are inevitably left out. In this light, the 'notion of irresponsibility' expounded in this thesis within the concept of responsibility represents a primary vulnerability. Despite our best intentions we cannot fully govern or control the effects of the mediating processes of communication and of organization we use both upon us and upon others. Yet, we must try to distinguish between an inescapable and unwilled irresponsibility in the heart of ethics from the irresponsibility that we can perhaps avoid through recognizing some primary sites of irresponsibility. Otherwise, it seems, we would have effectively removed any possibility of active moral agency and of social change, as Campbell noted, "stasis would be death."⁸¹² Butler's insistence on the postulation of the subject that is not self-grounding and cannot fully account of itself complements the irresponsibility of responsibility we find in Derrida. 'Theorizing responsibility' must, in a Derridean sense, be ungrounded and undecidable but also through Butler grounded in our recognition of a mediated, uncertain and vulnerable self who is not always capable of recognizing the other neither to fully give an account of itself. This violence of misrecognition, both of the self and of the other is a violence of recognition that also lies in our collective actions of recognition – 'we' are not always capable of fully articulating a collective account of ourselves.

'Scenes of address' also entail processes of narration. 'Narrative capacity' constitutes for Butler a precondition for any account of moral agency.⁸¹³ In *Excitable Speech*, Butler attempts to account on how vulnerable we are to

⁸¹² Campbell, 1992, *op cit.*

⁸¹³ Butler, 2005, *op cit.*, p. 12.

language and its effects and how the ‘citationality’ of discourse, i.e. the subject’s conditionality or partial non-autonomy, can work to intensify our sense of responsibility for the discourse itself.⁸¹⁴ Drawing on Foucault, “the subject has its own ‘existence’ implicated in a language that precedes and exceeds the subject, a language whose historicity include a past and future that exceeds that of the subject who speaks”.⁸¹⁵ Butler emphasizes on the social dimension of normativity, in order to show that normativity precedes and exceeds any dyadic encounter.⁸¹⁶ In *Bodies that Matter*, Butler explicates how sexual difference is produced by the social and normative constructions, which normalize, dominate and hierarchize conceptual distinctions of gender.⁸¹⁷ Coextensively, in *Precarious Life* Butler explores how western and liberal forms of life are being differentiated in terms of value against non-western and illiberal forms, especially in post 9/11 global society.⁸¹⁸ The differential allocation of grief chooses who normatively counts as a human as it highlights those we exclude from the necessary process of grief.⁸¹⁹ Then we can go about and ask “the conditions under which a grievable life is established and maintained, and through what logic of exclusion, what practice of effacement and denominilization.”⁸²⁰ Here we could think of the recent reaction and publicity which the Paris attacks received, as opposed to the Beirut attacks in 2015 which happened a day before. For Butler grievability is an obituary to life that makes possible non-military responses to violence: “the violence we commit is violence that falls within the realm of the recognizably human, but the

⁸¹⁴ Butler, 1997, *op cit.*, p. 24- 27, Butler wishes to bridge Austin’s notion of illocutionary utterance, i.e. the notion that speech acts injure or wound through the moment of speech with the Althusserian view of speech acts as interpellation, i.e. the process by which ideology addresses the pre-ideological individual and produces him or her as the subject proper. For Althusser the speech act, as “ritual”, that brings the subject into linguistic existence precedes the subject, for Austin, the subject who speaks precedes the speech in question. For Butler, *the subject is neither a sovereign agent with purely instrumental relation to language, nor a mere effect* whose agency is pure complicity with prior operations of power.

⁸¹⁵ Butler, 1997, *op cit.*, p. 30-31 citing Foucault, that the time of discourse is not the time of the subject, Butler provides a post-Althusserian reading of the notion of interpellation, i.e. that the linguistic constitution of the subject can take place without the subject’s knowing, in p. 32, According to Butler identity is a function of that circuit but does not preexist it, the moment of the speech act represents an act of self-constitution through which the subject can break with prior context, and ‘re-work’ the force of the speech act against the force of injury by misappropriating the force of speech from those prior contexts.

⁸¹⁶ *Ibid.*

⁸¹⁷ Judith Butler. (1993). *Bodies That Matter: On the Discursive Limits of “Sex”*, Routledge, New York and London.

⁸¹⁸ Judith Butler. (2004). *Precarious Life: The powers of mourning and violence*, Verso Books.

⁸¹⁹ *Ibid.*, p. 30.

⁸²⁰ *Ibid.*, p. 38.

violence that others commit is unrecognizable as human activity, then we make use of a limited and limiting cultural frame to understand what it is to be human.”⁸²¹ There is an abundance of such ‘hierarchy of grief’ in everyday life, which is not limited to a differential treatment between western/nonwestern lives but also *among* all life. In this case, the differentiation between lives that count more or less, becomes part of an economic exchange. The diplomatic/financial ties, bilateral and other trade agreements, differentiate between states that are going to be publicly demonized, blamed and face sanctions for their mass human rights abuses (these are the lives whom a foe kills) and those who are going to escape the sanctioning regime or loud public condemnation (these are the lives whom a friend kills). An illustration is Saudi Arabia’s coalition and its mass human rights violations in the war in Yemen, receiving considerably less systematic attention, sanctions and political condemnation as opposed to Assad’s Syria.⁸²² The UK in February 2018, amidst the war and investigations into mass human right violations in the Yemen war, offered ‘red carpet treatment’ to prince Mohammed bin Salman in his visit to the UK.⁸²³

Narration, rhetoric and the transference of language through ‘speech acts’ work not only “as a means by which information is conveyed but also as a rhetorical deployment of language that seeks to *act upon* the other... this telling is doing something to you, acting on you, in some way and this telling is also doing something to me, in ways that I may well not understand as I go.”⁸²⁴ In this light, the ‘performative’ is a force and ‘performativity’ is a process which effects, injures subjects but also enacts subjects. According to Butler, “...the ‘I’ has no story of its own that is not also the story of a relation – or a set of relations – to a set of norms”.⁸²⁵ Norms and conventions produce ‘frames’ of ‘recognizability’ which are

⁸²¹ *Ibid.*, p. 89.

⁸²² Rick Gladstone. (2016, January 31). Saudi Coalition in Yemen Inquiry into Bombings, *The New York Times*, Retrieved from nytimes.com.

⁸²³ Emily Thornberry. (2018, March 7). Britain’s red carpet for the Saudi ruler is shameful, *The Guardian*, Retrieved from theguardian.com.

⁸²⁴ Butler, 2005, *op cit.*, p. 51.

⁸²⁵ *Ibid.*, p. 8.

themselves produced through ‘schemas of intelligibility’.⁸²⁶ For Butler, the language that *frames the encounter* is also a language of normativity that suggests what will and will not be recognizable. As Butler notes, this is, in a way, Foucault’s supplement to Hegel.⁸²⁷ Along these lines, discourse can be thought of as a history of ‘interpellations’. A successful performative “*accumulates* the force of authority through the repetition or citation of a prior and authoritative set of practices.”⁸²⁸ If the performative succeeds and becomes law “the meaning of political opposition runs the risk of being reduced to the act of persecution.”⁸²⁹ Something meaningful might be lost in the instance of juridification. A ‘history of interpellations’ is lost, yet is this history utterly irrecoverable?

To attempt to understand the history of the discursive framework(s) under which, and the juridical ordering through which, a moral or political thesis materializes, along with its particular historical conditions, is a practice which seeks to account how we become adapted to prevailing views of the subject and how, perhaps, we can then see over restrictive normative fixations. Such ‘prevailing views’ or normative fixations become more visible when the objective reality that is advocated, or the representation, fails to live up to ones apprehending of reality or to its living material conditions. A ‘performative failure’ is the site where the performative fails in some way to capture and seize a normative or perceptual context. Something in what was done fails to live up to what was said, promised or represented. For Derrida breaking force (*force du rapture*) is a structural feature of any sign.⁸³⁰ The chance of failure is proper to the speech act itself and can “enter these performative circuits.”⁸³¹ According to Butler “when perlocutions fail, it is because a certain discursive wager on what reality might be fails to materialize.”⁸³² For both Butler and Derrida ‘performatives’ are dynamic because they can break with context. ‘Performativity’,

⁸²⁶ Butler, 2010a, *op cit.*, p. 8-9.

⁸²⁷ Butler, 2005, *op cit.*, p. 30, on the language that frames the encounter.

⁸²⁸ Butler, 1997, *op cit.*, p. 51

⁸²⁹ *Ibid.*, p. 50.

⁸³⁰ Jacques Derrida. (1977). *Limited Inc*, Northwestern University Press, Evanston, IL, pp. 9 to 10.

⁸³¹ Judith Butler. (2010b). Performative Agency, *Journal of Cultural Economy*, Vol. 3, Issue 2: Performativity, Economics, Politics, pp. 147-161, p. 148.

⁸³² *Ibid.*, p. 153.

is also the capacity of the performative to effect change. The performative, “not only fails” but “depends on failure.”⁸³³ ‘Performative politics’, according to Butler, refers to certain acts of self-constitution that can and do control our material identities: “If we say for example, for instance, that gender is performatively constituted, then we call into question whether there is a stable gender in place and intact to prior expressions and activities, that we understand as gendered expressions and activities”⁸³⁴ Coextensively, to understand the responsibility of the ‘international community’ or of ‘sovereignty’ as performatively constituted is to inquire on their mechanisms, expressions and activities. It is also a precondition to the question of who am ‘I’, ‘we’, ‘you’ or ‘they’. It is in this sense that both Butler’s account of responsibility and Derrida’s radical responsibility ‘deterritorialize’ responsibility. Their account represents a linguistic or aesthetic turn, on how one understands moral agency and responsibility through the constitution of moral agency itself.

In this light, foreign policy, intervention and representations of the ‘international community’ through theory and practice are sites of self-constitution and of becoming *with*. Furthermore, the responsibility to protect concept also emerges as such a ‘scene’ linked to a specific ‘structure’ and carries a particular juridico-moral framework, which circumscribes and controls our responsibility practices. Drawing on both Derrida and Butler, R2P as an institutionalized moral framework and language, which has accumulated the force of authority through repetition or citation of prior and authoritative set of practices, has thus become ‘successful’. It has therefore been reduced to an act of persecution where, according to Butler, meaningful political opposition is threatened or compromised. It is therefore only a performative failure or contradiction that can enter its ‘performative circuits’ and uncover perhaps its ‘anachronistic’ and violent ethos.

d. R2P as a foreclosing structure/mode of address

⁸³³ *Ibid.*, p. 159.

⁸³⁴ *Ibid.*, p. 147.

The responsibility to punish?

The operation of the responsibility to protect concept to support a humanitarian military intervention can be perceived as a space, or 'scene of address'. Through this 'space' the collectivity that is the 'international community' becomes positioned to give an account of itself and to others in relation to the suffering produced by mass crimes and mass human rights violations. The responsibility to protect concept emerges as a structure/mode of address whereby identities, meanings and courses of action begin to take shape and form ideas and images of who the 'international community' is and who is the subject of protection. Building on Butler, the decision to use force and how is necessarily superseded by the structure of address in which it takes place. The concept is a 'narrative' with an older and broader juridico-moral framework of reference that precedes a decision of the UNSC and any humanitarian and/or protective practice. It is important that we understand R2P as a mode of address, so that we take into account the form, which that address will finally take. Now, a *foreclosing ethical structure of address* is one which does not take into account the conditions of the constitution of the subject of both self and other as its point of reference and as limits to its 'ethical relationality', but builds upon delimited 'sovereign' or self-assured notions of subjectivity and moral agency. If the desire is to be recognized, to live and persist, then a foreclosing structure of address is one that does not take into account the full scene of recognition which includes the scene of misrecognition, of mediated, vulnerable, performative individuals or collective subjects. To extend this argument, if we understand R2P as a mode of address, which has accumulated the force of authority, is constitutive and constitutes collective subject-formation, then not to account for this 'scene' is a foreclosure to the possibility of responsible ethical relations per se. In the case of the responsibility to protect concept it is impossible to provide a rounded critique of the concept that is limited to legal accountability. The responsibility to protect concept is primarily an ethical precept that grounds universal jurisdiction on the use of force in response to social and political violence. It is thus a political and

ethical mode of address, which frames a global 'scene' of social recognition. Furthermore, as it provides the grounds of universal jurisdiction on the use of violence, it can be seen as a global institution of punishment. According to Butler:

"the institutions of punishment and imprisonment have a responsibility to sustain the very lives that enter their domains, precisely because they have the power, in the name of "ethics", to damage and destroy lives with impunity. If, as Spinoza maintained, one can desire to live life in the right way only if there is, already or at the same time a desire to live, it would seem equally true that the scenario of punishment that seeks to transform the desire for life into a desire for death erodes the condition of ethics itself."⁸³⁵

Could it be even said, that the responsibility to protect concept by reiterating a victorious, coherent, liberal international self (with all this implies) or by its failure to account for the 'sites of irresponsibility' that it operates within responsibility practices as being reduced to an act of persecution and punishment, performs a form of address and indicates a view of life that coincides more with a Nietzschean understanding of morality, that is aggressive and turns back on itself?

The new phase of international policing and of security, which emerged at the end of the Cold War feeds upon the dreams of a nebulous cosmopolis. Liberal international law indicates that the maintenance of peace and security is to be fulfilled through a strengthening of international law and of the notion of international criminal responsibility in particular. Therefore, punishment is a central element in discharging the responsibility of the international community towards the victims of gross human rights violations. Cosmopolitan, liberally conceived, human subjects are to be protected under consensual and 'collective' military power. Douzinas has labelled this security agenda as 'military humanism': the new *justa causa* being that of human rights.⁸³⁶ The responsibility to protect therefore, within these particular historical conditions, captures the liberal need to normatively frame the post-Cold War ethical response to mass human rights atrocities in which collective human institutions lost *credibility*,

⁸³⁵ Butler, 2005, *op cit.*, p. 49.

⁸³⁶ Costas Douzinas. (2013). Humanity, military humanism and the new moral order, *Economy and Society*, Volume 32, Number 2, May, pp. 159-183.

identity and *meaning*. The rushed calls to an ‘end to impunity’ highlights the urgency of international political authority and of international law, now unconstrained by an other, to *act* in the name of human rights. In the name of populations some become rightless. Douzinas states:

“the unjust, inhuman enemies of the international moral order deserve no mercy. They must be punished paradigmatically in order to establish the moral authority of the new military humanism. The punishment grounds the right of the punisher to mete out the medicine.”⁸³⁷

Through this lens, punishment is seen as a method of social cohesion under a specific historical world order. The responsibility to protect concept is the last refuge of political authority to fill the ‘void’ of a certain ‘international community’ in the absence of fixed normative universal values. Chapter 2 attempted to untangle the relationship between the concept of the responsibility to protect and the juridico-moral domain of just war theory. As such, the chapter highlighted the limitations, inherent problems and contradictions of just war theory that become part of the concept of the responsibility to protect. I have argued that the punitive element of just war thinking operating as the other side of protection, and its deep rooted intellectual relation to sovereign authority and order is an undervalued element, which has serious practical consequences on the meanings and effects of humanitarian protection practices. Lauren Wilcox, drawing on Butler has observed that the responsibility to protect concept as a security practice “[is] implicated in (and reliant upon) different kind of bodies and configurations of bodily relations.”⁸³⁸ According to Wilcox: “taking seriously the bodily precariousness means being attentive to the discourses that produce certain subjects as inhuman or as only bleeding, suffering bodies outside the full political context under which we and they are constituted.”⁸³⁹ Such analyses have the potential to identify the epistemic and normative limits of extending protection and social recognition. As Christopher Hobson also notes:

⁸³⁷ Douzinas, 2013, *op cit.*, p. 173.

⁸³⁸ Lauren Wilcox. (2015). *Vulnerable Bodies and the Responsibility to Protect*, in Lauren Wilcox (ed.) *Bodies of Violence: Theorizing Embodied Subjects in International Relations*, Oxford University Press, p. 166.

⁸³⁹ *Ibid.*, p. 189.

“there is a pressing need to reckon... the violence and vulnerability central to R2P but often absent from the discourse surrounding it. Doing so offers the possibility of developing a more nuanced understanding of harm, one that avoids the comfortable binary tendencies... which separate protector and protected, aggressor and victim, right and wrong.”⁸⁴⁰

The responsibility to protect concept was an attempt to rearticulate universal jurisdiction of justified uses of violence in response to ‘failings’ of protection of the international community’s constituent parts, its states. Through the analysis of the meaning and effect of individualization within the responsibility to protect, it has been argued, that the responsibility to protect concept overemphasizes on a normative framework of individual responsibility. State responsibility, and its concomitant ‘sovereignty as responsibility’, is a form of individual legal accountability in which ‘failed’ or ‘rogue’ states become blameworthy of their condition. One of the connecting arguments of both previous chapters (2 and 3) was that this normative framework overshadows structural complicity and systemic violence. In this sense, legal accountability and individual responsibility work to overshadow structural complicity and collective (social) responsibility. The concept results in an oxymoron whereas a collective responsibility and a ‘universalist aspiration’ is being professed through and by the ‘international community’ but is only ‘particularly’ realizable only through the state. Its cosmopolitanism is grounded on a discourse of individualism and agency that exhausts itself at these particular limits and fails to identify precisely these as limits of its global responsibility. This results in an articulation of responsibility and of international law that necessarily ‘falls’ because the individual or the state finds itself as the first causal link of violence and of accountability. It is in this sense that its ‘cosmopolitanism’ fails its promise at an inter-subjective and intra-subjective level and becomes a foreclosing structure of address. Dan Bulley defines this kind of subjectivity as ‘failing subjectivity’ differentiating between ‘succeeding’ (subjects) and failing (objects). State failure, in this sense, manifests as “a privileged discursive point, or master

⁸⁴⁰ Christopher Hobson. (2016). Responding to Failure: The Responsibility to Protect in Libya, *Millennium: Journal of International Studies*, Vol. 44, Issue 3, pp. 433 – 454, p. 453.

signifier that establishes the oppositions that make meaning possible and fix it there.”⁸⁴¹

It is perhaps this political strand of cosmopolitanism that translates into a responsibility to punish under the rubric of protection. It is this form of control that Francis Deng, as representative of South Sudan, attempted to express, when he said: “It was time for the United Nations to engage the Government on this constructive agenda [help in building governance capacity] instead of using negative threats of sanctions and punishment.”⁸⁴² It is finally, perhaps, this sense of management and control that ‘feels’ like collective punishment. Chapter 2 argued that the ‘responsibility’ we find in proponents of just war thinking such as Walzer, Tesón and Bellamy rests substantially on an idea of an ‘international’ coherent self, defined in terms of its shared values, its liberal and equal members. Even if these authors sometimes make different judgments about military intervention in reference to an intervention’s specific context, their juridico-moral framework recreates such a ‘privileged discursive point’. The framework allows the ‘international community’ to adopt paternalistic and punitive policies aimed at the reconstruction of regimes and formations of government that will be willing to adopt liberal policies or engage in putative diplomatic ties, political and trade relations. If the responsibility to protect communicates a duty of care and performs a form of care that results in punitive or exclusionary practice, it also normalizes, depoliticizes and immunizes a self-assured self against an Other. The Other becomes an alterity: it is not part of the constitution of the self and becomes punishable. It can be argued that this vantage point is one in which the ‘international community’ of liberal international law and of legal cosmopolitanism projects a self-assured subjectivity over other forms of life, differentiates between forms of political subjectivity and between both causes and harms. *Such a universal structure of address is a foreclosing structure*, it closes off an array of responses that can be utilized at the time of the encounter itself by implicating the self in an inter-subjective ethical relation that begins

⁸⁴¹ Dan Bulley, *op cit.*, Chapter 2 under the heading “failing subjectivity”.

⁸⁴² United Nations Press Release, SC/12073 (2015), *op cit.*

with the limits of responsible action and the limits of self-understanding. In contrast, the victorious self - proud of its liberal policies and institutions - declines to account for the forms of violence it operates through its responsibility practices and its foreign policy, fails to grasp structural punishment as part and parcel of international law and most importantly fails to be reflective and critical of its own limits and internal responsibility and therefore, its own role as a mechanism of collective subject-formation. This is a vantage place of comfort.

Recognizing failure, irresponsibility and vulnerability: in being-with

It is in this sense that the 'notion of irresponsibility' presents a site of discomfort, of complexity, of intellectual restlessness and vulnerability. The responsibility to protect concept becomes violent once its form of address within the historical and social conditions of its emergence regulates a 'we' that is always uncertain and historically contingent. It is a 'we' that emerges as it speaks and acts. If what I am unable to tell is an account of the 'I', let alone to tell an account of the 'we', then what binds us is perhaps our failure to account for ourselves. To know the limits of our global responsibility and to let go of an international coherent self might open the way for our condition of responsibility. According to Butler:

“condemnation can work against self-knowledge, inasmuch as it moralizes a self by disavowing commonality with the judged. Although self-knowledge is surely limited that is not a reason to turn against it as a project... To know oneself as limited is still to know something about oneself, even if one's knowing is afflicted by the limitation that one knows. Similarly, condemnation is very often an act that not only 'gives up on' the one condemned but seeks to inflict violence upon the condemned in the name of “ethics”.”⁸⁴³

Through this lens, *to expose and to acknowledge* our limits of intelligibility and of responsibility is to rethink responsibility in terms of a relation that builds upon the conditions that bring moral subjects into being.⁸⁴⁴ It is an account that turns the light inwards, first upon the self or the 'we' before turning the face towards another. This understanding attempts to offer an account of responsibility that is

⁸⁴³ *Ibid.*

⁸⁴⁴ See also Patchen Markell. (2003). *Bound by Recognition*, Princeton University Press, Markell argues that social recognition can become 'a medium of injustice'. For Markell the pursuit of recognition involves a violence 'of a deeper kind', the violence of one's own self-understanding. According to Markell: "the source of relations of subordination" is "the failure to acknowledge one's own basic situation and circumstances", at p. 7.

detached from strict legal accountability or state 'sovereignty as responsibility' and grounds an account of responsibility that is more structural, complex and internal. Whereas the normative incoherencies and sites of irresponsibility are brought to light and challenged, proponents of the concept and of legal cosmopolitanism tend to attack back by accusing those critics of 'pessimism' or 'inaction'. That these critics and their critiques do not make sense of the 'messy world of politics and policy', or, that they are unrealistic about the use of military force (and violence) as indispensable means of 'responsible' statecraft and international life. How military intervention can bring about ends – halt the violence, save the victims, transform these 'failed states' into democratic states and bring them under the rule of international law, its customs and conventions.

Much of this denial which liberal international law suffers from rests upon a 'failure' to acknowledge the performative and discourse oriented normative ethical framework, its sites and domains in which this professed responsibility becomes irresponsibility (i.e. irresponsibility is internal to responsibility practices), not only by being a failed policy but as an 'irresponsible mentality' produced through modern social forms of organizing responsibility, through the foundational violence of liberal international law and through a kind of violence and misrecognition at the heart of ethics. Accordingly, it can be argued that liberal international law and its attendant uncritical legal cosmopolitanism is complicit in the organization of irresponsibility when it 'fails' to recognise first its own mutative, variable and context specific nature of political subjectivity. Contrary to an idea of 'international community', of sovereignty and of responsibility as performatively constituted, the ethical underpinnings of the responsibility to protect fixate subjects, concepts and responses under already delimited and binary understandings (such as 'successful' and 'failing' states). In this sense, one could argue that responsibility practices become aggressive, they coincide with an aggressive view of life, one that turns back on itself, as it fails to recognise its others as constituent parts of itself and 'immunizes' the self and the

community in opposition to itself.⁸⁴⁵ Alterity then, becomes something to combat (with arms and coercion) and not something to understand or to recognize predominantly.

'Terrorism' and misrecognition

The responsibility to protect concept has also been used in response to states that 'harbour' terrorism or are unable to defeat terrorists within their borders. As such, these states become subjects to the use of military force without their consent because they have 'failed' to confront a serious threat. Two days after the Paris attacks, France carried airstrikes on ISIS strongholds in Raqqa. These airstrikes can straightforwardly be described as punitive, perhaps also carrying an element of retribution.⁸⁴⁶ The Russian and Turkish responses in Libya and Syria, opposing the NATO strategy in dealing with humanitarian crises, suggest that the logic and interests of the US, the UK and France are against Moscow's understanding of when and how NATO allies are supposed to act in response to gross human rights violations and intra-state conflict. This understanding is deeply affected by regional interests, values, ethnic and religious identities.⁸⁴⁷ The resulting crisis of post-Qaddafi Libya prompted Russia to opt towards 'regime security' to avert a regional crisis between different Islamic and opposing fractions, to control the situation in the North Caucasus and to prevent a strengthening of the western liberal paradigm of doing foreign politics in the Middle East. Turkey follows a similar practice of 'regime security'. Nonetheless, all countries concerned opted for the use of military force against those whom each camp considers as terrorists or a 'serious threat' to their security. All of these states use the same moral argumentation to assault the peoples whom each camp considers a 'terrorist threat'. The official response from the United Nations, following an alleged bomb attack on a Russian jetliner which killed 224 people

⁸⁴⁵ Derrida, 2005a, *op cit.*

⁸⁴⁶ See Stahn, *op cit.*, pp. 967 to 970, reprisals during peace are generally prohibited and belligerent reprisals in international law have been constrained over time.

⁸⁴⁷ Roy Allison. (2013). Russia and Syria: explaining alignment with a regime in crisis, *International Affairs*, Vol. 89, Issue 4, pp.795-823.

over the Sinai and the Paris attacks - coupled with other terrorist attacks in Tunisia, Ankara and Beirut - was the adoption of UNSC Resolution 2249 on 20th of November 2015. The resolution called up on member states:

“that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da’esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups,...”⁸⁴⁸

It is counter-productive, to say the least, to expect that such a broad resolution with such an extensive list of terrorist groups will not be used to further one’s security and regional interests. More important, however, is the rationale which holds a state ‘unable or unwilling’ to deter a terrorist threat and that becomes simplified and recognized altogether as a ‘threat to international peace and security’ and a ‘threat to mankind’, incorporating the language, framework and recent practice of the responsibility to protect concept.⁸⁴⁹ Punitive counter-terrorist military airstrikes, without the consent of the ‘failed’ state are further linked to the wording and language of R2P and obscure further the thin line between protection and punishment and control or management from above.⁸⁵⁰

Furthermore, the international response to terrorism becomes ‘foreclosed’ within the same normative and ethical framework at the cost of taking seriously, and for all parties and countries involved, the roots, causes and complexity of violent radicalism, extremism and violent fundamentalism. In contrast, terrorism has become widely linked with states, religions and ethnic identities and as such, both research and practice becomes foreclosed, under-examined and largely unexplored. Following Butler, such treatment is a form of dehumanization, which makes possible the assertion of a ‘we’ that “defines itself over and against a

⁸⁴⁸ UNSCR 2249 (2015), Retrieved from undocs.org

⁸⁴⁹ Samantha Power. (2014, September 23). Letter to Secretary-General Ban Ki-moon, Retrieved from justsecurity.org, and Michael Scharf. (2016). How the War against ISIS changed International Law, *Case Western Reserve of International Law*, Vol. 48, Issue 1, p. 53.

⁸⁵⁰ For Bellamy R2P is the right moral and operational framework in response to the terrorist threat and presents no complications, see Alex J. Bellamy. (2015a, April 20). ‘*The Islamic State and the Responsibility to Protect*’, Retrieved from opeancanada.org.

population understood as by definition illegitimate, if not dubiously human.”⁸⁵¹ In relation to our preference for certainty and self-assurance, as opposed to complexity and discomfort, Tanzil Chowdhury stated that “structural violence, as one of the contributory explanations of terrorism, offends both our predilection for simplicity and holds government to account to a very high standard – and for those reasons, we often reject them to our peril.”⁸⁵² François Hollande addressed the nation in the aftermath of the Paris attacks of November 2015 and vowed revenge, “We are going to lead a war which will be pitiless” and described the attacks as “acts of war”:

“What the terrorists want is to scare us and fill us with dread. There is indeed reason to be afraid. There is dread, but in the face of this dread, there is a nation that knows how to defend itself, that knows how to mobilize its forces and, once again, will defeat the terrorists.”⁸⁵³

The assertion here of a ‘we’, a nation that ‘knows best’, is a representation of a ‘privileged discursive point’, a claim of self-identity, a representation of mastery and comfort that not only knows how to defend and defeat (has ‘already’ done so) but knows ‘what the terrorists want’ and in a sense it is a representation that knows what ‘terrorism’ is. This understanding not only crudely simplifies what and who a terrorist is, but much more importantly it “denies its own constitutive injurability.”⁸⁵⁴ We have witnessed that such rhetoric and practice sustained the airstrikes in Libya, Syria and Iraq against terrorist strongholds, even if the terrorist attacks are carried out in other countries and therefore, revealing a wider network with multiple sites of command. Many of those, which were identified as guilty for the attacks, were citizens born and raised in European soil not necessarily ‘harboured’ in those ‘failed’ countries.⁸⁵⁵ This very simplicity in recognizing and identifying who counts as a terrorist and where such terrorists

⁸⁵¹ Butler, 2004, *op cit.*, p. 91.

⁸⁵² Tanzil Chowdhury. (2017, May). Why is it so hard to accept foreign policy plays a part in terrorism?, in *Critical Legal Thinking: Law and the Political*, Retrieved from criticallegalthinking.com, see also in Watt, N. (2015, December 2). David Cameron accuses Jeremy Corbyn of being a ‘terrorist sympathizer’ for not being in favor of coalition airstrikes as a response to the Paris attacks, *The Guardian*, Retrieved from theguardian.com.

⁸⁵³ Swati Sharma. (2015, November 13). “It’s horror: French President Hollande’s remarks after Paris attacks”, *The Washington Post*, Retrieved from washingtonpost.com.

⁸⁵⁴ Butler, 2010a, *op cit.*, p. 178.

⁸⁵⁵ Kim Willsher. (2018, February 5). Trial of Paris attacks suspect Salah Abdeslam opens in Belgium, *The Guardian*, Retrieved from theguardian.com

reside is a self-certain understanding that ‘we’ are able to ascertain not only who counts as a terrorist and who does not but also that ‘we’ are able to strike in precision and kill the individuals responsible. Such a representation may very well be counter-productive for both our understanding of ‘terrorism’ and ‘terrorist acts’ and our complicity in creating what we name in the other – namely, fear. As Butler states: “As much as the sovereign subject disavows his injurability, relocating it in the other as a permanent repository, so the persecuted subject can disavow his own violent acts, since no empirical act can refute *a priori* presumption of victimization.”⁸⁵⁶ Through this lens, the slogan that emerged after the attacks: ‘We are not afraid’, to which thousands marched, can also be seen as counter-productive. There is reason to be afraid but as a reason to contemplate an inevitable physical vulnerability and “the possibilities of our own violent actions in relation to those lives to which one is bound” everyday and everywhere.⁸⁵⁷ Drawing on Butler and the justification given for the Iraq War, Maja Zeufuss observed the problematic notions of subjectivity and vulnerability and suggested that “arguments for the war cannot effectively be contested logically, rather we must highlight the way in which they produce what they name.”⁸⁵⁸ Zeufuss does not focus on ‘how the war undermines the goods it claims’ but on “how the justification produced a considerable amount of certainty about who ‘we’ are.”⁸⁵⁹ According to Zeufuss: “the question of ethics, of how we relate to others, is in danger of obscuring the way in which we are always already related to them.”⁸⁶⁰ In other words, we are vulnerable not only to others but to ourselves. The rise of the Islamic State in Libya and beyond is the evidence of the inability to realize the potential consequences of our practices.⁸⁶¹

Where and when failure lies

⁸⁵⁶ Butler, 2010a, *op cit.*, p. 179.

⁸⁵⁷ *Ibid.*

⁸⁵⁸ Maja Zeufuss. (2007). Subjectivity and Vulnerability: On the War with Iraq, *International Politics*, Vol. 44, pp. 58-71.

⁸⁵⁹ *Ibid.*, p. 69.

⁸⁶⁰ *Ibid.*, p. 70.

⁸⁶¹ Hobson, *op cit.*, p. 450, See also, Patrick Cockburn. (2017). Is the War Over?, *London Review of Books*, Vol. 39, No. 24, 14 December, pp. 17-19.

Christopher Hobson reasons a 'humble approach' and practice: "a humble approach is not only accepting the limits of what is knowable, but also acknowledging and working within the limits that can be readily identified."⁸⁶² Such an approach differs significantly from the approach taken by a number of supporters of the Libyan intervention, which celebrated the intervention's rapid response equating in a sense an authorized military action with responsible action because it happened to be consensual and legal. Drawing on the consequences of the intervention in Libya by NATO and its allies, Hobson states that there was 'sufficient evidence' and reasonable expectation that post-conflict reconstruction would be met with serious structural and political difficulties that could tear the country apart. The intervention was carried out in support of rebel forces, which 'were not reliable or united' and this was a fact that was known to UN corridors long before the decision to intervene.⁸⁶³ The simplistic assertion of a 'we' against the 'terrorist threat' is similar to the simplistic assertion of a 'we' that can locate similar 'moderates' in other countries and befriend them. Here, not only is there a fabricated confidence of who the 'we' is in the first place but there is also a false certainty in transferring 'our' own subjectivity in those others and removing from them at the same time the possibility of deliberation and reflection of their own political subjectivity. For Hobson 'the notion of humility' he finds in the work of Reinhold Niebuhr:

"has relevance both for political actors directly engaged in making decisions, as well as for commentators and scholars analyzing and advocating certain courses of action... This brings with it a sense of responsibility, which entails squarely facing the consequences of decisions made, and accepting failure when it occurs."⁸⁶⁴

Hobson claims that R2P was born out of failure and he is right to claim so.⁸⁶⁵ But what failure is he referring to? The inaction in Rwanda was interpreted and morphed into the 'never again' rhetoric. It then transformed into a *slogan for action*. In contrast, the intervention in Kosovo – where unilateral military intervention did take place – morphed into a debate for 'failing consensus' and an

⁸⁶² Hobson, *op cit.*, p. 450

⁸⁶³ *Ibid.*

⁸⁶⁴ *Ibid.*, p. 441

⁸⁶⁵ *Ibid.*, see also Seymour M. Hersh. (2016). Military to Military: on US intelligence sharing in the Syrian War, *London Review of Books*, Vol. 38, No. 1, 7 January, pp. 11-14.

institutional debate of legality/illegality. Kosovo was interpreted as a case of 'failing consensus' and the affirmation of the call to collective action overshadowed the structural significance of moral difference, or rather of the moral indifference of the inaction in Rwanda. Following the debate of legality/illegality of Kosovo, the 'failure', which the ICISS addressed, was more of a procedural and institutional nature. The commission was concerned with the establishment of a single political framework of reference under which dominant sovereign states and other parties could engage in international moral argument, rather than with a substantive evaluation of the practice and the consequences and meanings it produces in the here and now of international political space. In Darfur, as in Rwanda, R2P did not deliver the vision of collective and consensual action; as if R2P was a panacea, a cure that if applied would imply a new dawn for the people of Darfur.⁸⁶⁶ The intervention in Libya, as discussed in chapter 3, happened with the support of a UNSC, it was an authorized intervention under the language of R2P and was thus heralded as 'a new dawn' in protection practices, a concept that finally works. Here, again, as with the Rwanda-Kosovo contrast, the Libyan 'success' overshadowed the pragmatic inability to respond to the crisis in Darfur, not because R2P was not applied but because humanitarian crises of mass violations of human rights are structural and long-term.⁸⁶⁷ In each of these cases, 'failure' as a structural phenomenon, is never part of an analysis including the exact consequences of the management of conflict and of the meanings the intervention produces globally. More importantly, 'failure' is not taken up as a question of how the intervention altered the life conditions of those left to bear the aftermath of violence, of those that had not died. Today, R2P 'fails' again in Syria.

⁸⁶⁶ Alex J. Bellamy. (2005). Responsibility to Protect or Trojan Horse? The crisis in Darfur and Humanitarian Intervention after Iraq, *Ethics & International Affairs*, Vol. 19, Issue 2, pp. 31-54, P. D Williams and Alex J. Bellamy. (2005). The responsibility to protect and the crisis in Darfur, *Security Dialogue*, Vol. 36, Issue 1, pp. 27-47, Christina G. Badescu and Linnea Bergholm. (2009). The Responsibility to Protect and the Conflict in Darfur: The Big Let-Down, *Security Dialogue*, Vol. 40, Issue 3, pp. 287-309.

⁸⁶⁷ Alex Da Waal. (2007). Darfur and the failure of the responsibility to protect, *International Affairs*, Vol. 83, Issue 6, pp. 1039-1054.

Suffering and human pain in the face of mass atrocities temporally effects an insurmountable pressure to 'act' within already set ethical parameters and programmes. Yet those patterns of moral behaviour and codes of conduct have indeed failed the promise in more than one occasion. The stumbling dichotomies of legality/illegality and of action/inaction have overshadowed the theory and practice of the use of force for humanitarian purposes at the cost of "theorising responsibility" otherwise. In contrast to an understanding of failure as procedural or as a failure of 'consensus' for action, this chapter argues that failure should be understood as constitutive and internal. If we are to agree with Bauman that "human mutuality and community ... rest on a paradoxical collectivity of reciprocal individualization"⁸⁶⁸ or, with Mouffe that we are "always multiple and contradictory subjects... constructed by a variety of discourses, and precariously and temporarily saturated at the intersection of those positions"⁸⁶⁹ then, it seems that we have to rethink both a theory of responsibility and of 'failure' in terms of these limitations. Accordingly, the chapter does not propose a program or policy that can be implemented in order to respond to these limitations but instead takes these limitations as a precondition to theorizing responsibility in international law.

Concluding remarks

"... the capacity to make and justify moral judgments does not exhaust the sphere of ethics and is not coextensive with ethical obligation or ethical relationality...judging another is a *mode of address*...Hence, if there is an ethic to address, and if judgment, including legal judgment, is one form of address, then the ethical value of judgment will be conditioned by the form of address it takes."⁸⁷⁰

The ethical dispositions of the responsibility to protect concept attempt to control the 'void' of international political subjectivity and so control the space of moral argumentation in ways that paralyze our capacity to think and theorize responsibility otherwise. Conversely, the understanding of the event of using the responsibility to protect concept as a 'scene of address' (a 'space' of constitution and of process) presented in this chapter, is an attempt to explore our inter-

⁸⁶⁸ Ulrich Beck and Elizabeth Beck-Gernsheim. (2002). *Individualization: Institutionalized individualism and its Social and Political Consequences*, Preface by Zygmunt Bauman, p. xxi.

⁸⁶⁹ Chantal Mouffe. (2005). *The Return of the Political*, Verso Books, p. 20.

⁸⁷⁰ Butler, 2005, *op cit.*, p. 46.

subjective ethical relations. To understand 'sovereignty', 'international community' and 'responsibility' as performatively constituted is to overcome the stumbling dichotomies of legality/illegality and action/inaction. It is from this space of complex inter-subjectivity that one should begin 'theorizing responsibility' in international law. The 'sites of irresponsibility', which were explored in chapter 3 in relation to R2P as signified by Veitch, at first appear as if they obliterate any chance of responsible practice. In contrast, what they do, is to precisely *expose* those inter-subjective and social conditions that might push towards a 'theorizing of responsibility' that is reflecting on the complex material conditions of the process of responsiveness and of responsibility. Responsibility requires that we take stock of our *present*, that we include the effects of the division of labour, of role responsibility, of reciprocal individualization and alienation, and of the normative paradoxes that are produced through fragmentation and compartmentalization and treat them as real. These are indeed sites of irresponsibility that produce complexity and discomfort and arguably might complicate any decision process, long or short. Yet, these are also sites that reveal our shared vulnerability and uncertainty. The notion of irresponsibility comprised through 'sites of irresponsibility' as explained in the last chapter is a conceptual device that sheds light on the internal dimensions of responsibility practices and treats 'irresponsibility' *not as the opposite of responsibility but as responsibility*. Exposing, even speaking or writing of such sites of vulnerability and misrecognition, is to make an attempt to represent a little more of the reality or the full 'scene of recognition' of both the theory and practice of the responsibility to protect concept. In this light, the conscious recognition of that failure (of irresponsibility) through a process of self-critique that takes into account the social conditions of 'opacity' and coexistence with the other is responsibility.

The universal fails and becomes violent 'if it cannot be appropriated by individuals in a living way', or, more generally if it does not respond to their living conditions: "the universal precept ... if it did operate there as a precondition, as *sine qua non* of participation, it would impose its violence in the

form of an exclusionary foreclosure.”⁸⁷¹ What becomes of law and responsibility to protect the other under this understanding? Responsibility becomes a dead word perhaps. It is a responsibility that ‘forgets’ its political and violent past, neutralises, depoliticises and overshadows the struggles against past and present modes of persecution in the realization of human freedom and denies to come to terms with the discomfiting plurality of global inter-subjectivity. The recognition of the self and other as under ever-changing global social conditions of ‘irresponsibility’, of the *aporia* of responsibility, of the inescapable ‘failure’ to give an account for the other that is internal to responsibility practices, partly recalls and refuses to ‘forget’ struggle and the violent past. We are already in a global ethical inter-subjective relation with each other. In this light, we can argue that the universal precept should not be occupied by any identity, if that identity frames or recognizes one form of life over another. Nonetheless, the universal precept can never be thought of as ‘empty’, since it is always historically occupied by some ‘idea’ or ideas. As such, ethical exigency would need to always account for what international law or the universal represents and who represents it. We can argue that the universal is a site of exchange and recognition (or contest/struggle if one wishes to argue that) and international law a process of communication. If that space becomes occupied by a totalizing and teleological universal, that universal becomes violent and exclusionary. International lawyers have struggled over the years to make international law relevant - to make it work. Yet, if international lawyers and policy makers deny or ignore to account for the ‘operation of universality’ and what it produces “that ethos becomes violent.”⁸⁷²

This chapter explored the importance of on-going critical and moral inquiry in relation to responsibility practices and the use of force as a means of protection; response-ability as a form of critique. A concept of responsible protection needs always to move beyond disciplinary affinities and orthodoxies. As Derrida

⁸⁷¹ Butler, 2005, *op cit.*, p. 2.

⁸⁷² *Ibid.*, Adorno in Butler, 2005, *op cit.*, p. 6.

reminds us: “there is no responsibility without a dissident and inventive rupture with respect to tradition, authority, orthodoxy, rule, or doctrine.”⁸⁷³

Within the responsibility to protect, the notion of irresponsibility, can also be thought of as ‘performative contradiction’.⁸⁷⁴ It can work as *conceptual resource*, which exposes the internal contradictions of previous conventions and of formulations of the universal, and highlights the violence performed, in order to open the space of ‘re-signification’⁸⁷⁵ or re-imagination. The limits of responsibility (as irresponsibility) in this sense expose that anxiety of control and of mastery. That anxiety makes one reiterate past texts, and indeed play a specific role, persist within the comfortableness of institutionalized paradigms, including the paradigm of state accountability or the punishment through the protection framework of just war theory, against perhaps a robust theory or sense of social or collective global responsibility. The question of what the inter-national represents, what sovereignty entails and who the ‘we’ of the international community includes, is limited and foreclosed within these structures or modes of address. *It is in this sense that ‘irresponsibility’ presents a re-appropriation or representation of the scene of address, because it seeks to move towards a theory and practice of responsibility that recognizes these social modes of organizing responsibility as integral to the experience of responsibility.* These social modes occupy a domain of ethical failure. Yet, this ethical failure, or indeed precisely an acknowledgment of the failure to recognize becomes a resource for the repossession of ethical relationality per se. It is an understanding of an uncertain, historically contingent and vulnerable collective ‘we’. It is a response and protest against physical and ethical violence. Accordingly, this conceptual analysis turns to roots, systemic contradictions and modes of organizing as elementary to the understanding of different forms of global violence and how ‘we’ can perhaps live *with* uncertainty.

⁸⁷³ Derrida, 1995, *op cit.*, p. 22.

⁸⁷⁴ A contradiction of meaning which seeks to expose the sites which the dominant discourse excludes so that the discourse remains open to conflicting positions, it is a form of resistance to a ‘final reading’, see Butler, 1997, *op cit.*, pp. 89-92.

⁸⁷⁵ *Ibid*, p. 14, ‘re-signification’: “a kind of talking back” to a dominant discourse, a re-contextualization of words.

CONCLUSION

“Sacrifice, vengeance, cruelty – all that is inscribed through the genesis of responsibility and moral conscience.”⁸⁷⁵

This thesis offered a theoretical, socio-legal and philosophical critique of the responsibility to protect concept in international law. The conceptualisation of the ‘international community’, as well as its organized ‘responsibility practices’, representational structures, narratives and processes of individual and collective inter-subjective/intra-subjective constitution was a key feature of the analysis. This thesis attempted to overcome the limitations imposed by the sterile language of legality, illegality or legitimacy. It placed emphasis on how we arrive at a decision to use force, what patterns of thinking and modes of global international organization are intimately linked with our resourcefulness for global ethical judgement and the meanings and effects produced by ‘humanitarian interventions’. Hence, this thesis did not attempt to provide any solutions or policies on ‘how to end mass atrocities’, a resolution to the controversy over humanitarian intervention or its problems. The aim was to move towards a theory and practice of responsibility that ‘re-cognizes’ the social modes, visions and world-views that organize our thinking on human protection practice in international law.

At present, the mainstream discourse around R2P is preoccupied with: (a.) *collective action* (dubbed as ‘success’), vetoed Security Council resolutions or *unilateral action* (dubbed as ‘failure’), and (b.) individual and state accountability or blameworthiness (prosecuting perpetrators, punishing ‘crimes against humanity’). Also observable is an obsession to find “inventive ways to penetrate”, to manage conflicts, “end state-perpetrated atrocities”, and distinguish different kind of political subjectivities within a conflict.⁸⁷⁶ ‘Calls’ for humanitarian intervention, however benevolent, overshadow a range of normative and practical questions, such as what kind of action, by who, with whom and how such an intervention will improve the lives of the people left to bare the

⁸⁷⁵ Derrida, 1995, *op cit.*, p. 113.

⁸⁷⁶ Bellamy, 2015a, *op cit.*, p. 575.

aftermath of violence. Urgent appeals for the use of force, to alleviate the suffering, to punish perpetrators or ‘send a strong message to dictators’, fail to comprehend the meanings and effects of humanitarian interventions and often become the chief bulwark to robust approaches to mass human atrocities and gross human rights violations. The mainstream discourse around R2P is one that has: (a.) already established that there is a sound normative and ethical framework in which political decisions and questions of responsibility in response to mass atrocities can be taken, and (b.) that there is a sovereign ‘international community’ with its military (and even ethical capacity) to carry the promise of protection and decide between the good and bad, the perpetrators and victims. What we are therefore lacking from this almost completed picture of sovereign and self-assured humanitarianism, the discourse around the concept assumes, is the will, the criteria and the consensus to collectively authorize military interventions for human protection purposes. This thesis provides a radical theoretical and socio-legal approach by focusing on the limitations imposed by the present mainstream discourse around the responsibility to protect concept. As such, it embodies a critique of the liberal juridical and moral claims which the responsibility to protect concept inherited and represents. The structure of the thesis, as discussed in the introduction of the thesis and brought throughout, was specifically chosen in order facilitate the main goal of this work. The aim was to provide a rounded critique of the responsibility to protect concept in international law in both theory and practice and to offer an alternative approach, by highlighting the importance of inter/intra subjectivity, to ‘theorizing responsibility’ for large scale loss of life in international law, as well as the importance of ‘theorizing responsibility’ to understand inter/intra subjectivity in international law and international relations.

Rethinking the “theorizing of responsibility” for large scale loss of life in international law

International authority (universal jurisdiction) and punishment through protection

Chapter 1, explored the legal debates on the use of force both during and after the end of the Cold War. The chapter also reflected on the gradual development and expansion of peacekeeping and peace-enforcement operations. During the 1990s the Security Council was more willing to extend the notion of ‘threat to international peace and security’ and consider gross human rights violations as an international concern that may warrant the use of force for human protection purposes. Overall, the chapter exposed the tension between state sovereignty and human rights, between legality and legitimacy, as well as the practical impossibility of criteria such as consent and impartiality. The 1990s saw the revitalisation of international institutions and liberal policies and the re-moralization of the international order (the return of just war theory within R2P and the prominence of liberal/legal internationalism and cosmopolitanism). As such, since the 1990s, the tension between legality and legitimacy came to a breaking point in the controversy over the humanitarian intervention in Kosovo. The ICISS report was an attempt to ‘forge a new consensus’ on the over-debated issue of humanitarian intervention at the turn of this century. In other words, it has been an attempt to articulate the normative framework, criteria, codes of conduct and the authority under which a decision for humanitarian intervention should be taken. The redefinition of ‘sovereignty as responsibility’ that it articulated did not however ease any of the tension between article 2 (4) of the Charter and human rights. Ultimately, what the report did was to ‘marry’ legality and legitimacy. In light of the recent debates in the Security Council on the air-strikes carried out by the US, the UK and France over the alleged use of chemical weapons by Bashar Al-Assad in Syria on 14 April 2018, the question of when and where the ‘international community’ can intervene to alleviate the suffering of populations in other states remains a politically divisive issue. The Libyan intervention seems only to have been ‘collectively’ enforced because the geopolitical interests of the permanent members of the Security Council converged or did not severely clash. Given R2P’s impressive institutional and linguistic internalization, military intervention for human protection purposes is generally seen as both legal and legitimate if only “blessed by the Security Council.”⁸⁷⁷

⁸⁷⁷ Korhonen and Selkälä, *op cit.*, p. 849.

As discussed in Chapter 2, the juridico-moral framework of just war thinking as reinvented within R2P, claims to offer a “common language” that is “pluralistic” and “indeterminate.”⁸⁷⁸ Contemporary just war theorists, such as Walzer and pro-R2P supporters such as Bellamy, present just war theory as an apolitical framework within which each case of humanitarian intervention can be judged. As such, R2P’s ethical and operational framework is also presented as apolitical. Contrary to such accounts, it has been argued here that contemporary just war theory approaches that champion the reinvention of just war theory in R2P recurrently deny or fail to account for the punitive ethos of just war thinking. The rationalization of international constitutionalism, the ‘war convention’, natural law, positive law (its rules and entities) works to *legitimize* the juridico-moral framework of just war thinking and to overshadow the concepts of international authority, moral hegemony and power per se. R2P with its juridico-moral framework, should therefore be seen not only as an institution of protection but also as an institution of punishment. In this light, responsibility practices foster both protection and punishment and should be seen as such. Furthermore, responsibility practices should be viewed as power practices and techniques of global governance. An understanding of how it is that liberal moral authority, international legal authority and current frameworks of R2P, naturalize and mask discourses of exclusion is fundamental if we are to attend to some of the problematic features of broadly accepted and unaccounted violent practices or ethical presuppositions.

To hide the punitive ethos of humanitarianism under the rubric of protection is to fail to come to terms with the meanings and effects of punishment, as well as to what cosmopolitan ‘responsibility’ and ‘protection’ can translate into, namely a responsibility to punish transgressions of liberal international law. To recognize and acknowledge that the other of protection is punishment, pushes to a theory and practice that wishes to detect not only who is being protected, how and why, but who is excluded, not recognized and purged from the domain of the political in the name of ethics and human rights. In this sense, the punitive ethos of humanitarianism should be recognized, exposed, acknowledged and the

⁸⁷⁸ Bellamy, 2006, *op cit.*, see both introduction and conclusion of the book.

selectivity of war crime trials and criminals should be taken seriously. If, as discussed, human rights have the potential to be both militant and anti-militant, violent and non-violent, inclusionary and exclusionary, it is only by attending to their operation and binary nature that we are able to see how human rights actually materialize. Perhaps if we do not, we are only left with “human rights with a vengeance.”⁸⁷⁹

Just war theory is a juridico-moral framework that allows international actors to debate and argue the application of the use of force when a ‘threat to international peace and security’ occurs. Its criteria allow, from a sovereign standpoint, to make distinctions between perpetrators and victims, between just and unjust interventions and materially control the parameters of ethical and political questions. Significantly, it is not a framework that opens up questions on the use of force per se or indeed on the ethicality of military interventions for human protection purposes. The reasonableness of this framework “is established via the assumption that a particular framework, paradigm, or standpoint of normativity is *necessary*.”⁸⁸⁰ For both staunch R2P supporters such as Bellamy and legal cosmopolitans such as Louise Arbour, ‘collective’ action under the Security Council or individual criminal prosecution under the ICC, are from the outset implicated in the validation and reinforcement of the ethos of the responsibility to protect concept. In this sense, the mere exercise of international authority provides for the legitimacy of the concept and for the ethicality of its juridical and moral framework. Whereas international authority (in the form of the Security Council) fails to reach consensus, scholars such as Walzer, Bellamy or Fernando Téson highlight the primacy of the legitimacy of human rights or humanitarianism through the threshold criteria of just war theory within R2P, and are able to explicate why military interventions for human protection are necessitated. We are back to ontological assumptions about the nature of human life and its progress. In this instance, just war theory and the responsibility to protect concept work as feedback loops that justify liberal humanitarianism and liberal governance per se.

⁸⁷⁹ Simpson, 2016, *op cit*.

⁸⁸⁰ Campbell, 1998, *op cit*.

If we treat the responsibility to protect concept as a technique of liberal global governance, the ‘duty of care’ assigned to the ‘international community’ to protect individuals from mass atrocities through the concept of the responsibility to protect, more often than not, translates into a responsibility to punish violators of liberal international order, rather than on recognition, protection and/or solidarity. ‘Sovereignty as responsibility’, the concept that foregrounds the responsibility to protect concept, becomes a ‘master signifier’ that bifurcates the international order between ‘failed’ and ‘responsible’ sovereign states. In this light, ‘failed’, ‘failing’ states, or states that are ‘unwilling or unable’ to protect their populations are seen as objects to be ‘taken over’ by the ‘international community’ in the name of human rights. Their political subjectivity is compromised, assumed, managed. As Korhonen and Selkälä note, “[i]n its calls for universalism and humanitarianism, state responsibility within the international setting has expanded to cover politics over life itself.”⁸⁸¹ If the ethical global responsibility that is communicated materializes as management, control and punishment, then the promised cosmopolitan responsibility of protection becomes a dead word. It converts into legal individual accountability that is to be *assigned* within already established laws, distinctions, entities, and taken-for-granted frameworks. Instead, ethical/social and collective responsibility requires flexibility, should always be negotiated, explored and critiqued.

Internal irresponsibility and violence

In Chapter 3 the notion of irresponsibility was used as a conceptual resource that helped the analysis to draw on meanings and physiognomies of the concept of the responsibility to protect that have been largely excluded or marginalized by the discourse around R2P. The ‘notion of irresponsibility’ devised in Chapter 3, as other of responsibility within the responsibility to protect concept, ‘talked back to’ the discourse of R2P and pointed to certain ‘features of modern social forms of organization’ that we very often take for granted. These features, even if they

⁸⁸¹ Korhonen and Selkälä, *op cit.*, p. 854.

make up our present living conditions, are part of our everyday life, both private and public, are not easily identifiable. This is mainly because we do not think of these features as organizing irresponsibility, ethical failure or misrecognition. Features such as the division of labour and role responsibilities, reciprocal individualization, or the ‘transference of responsibilities’ through the distinctions and combinations of social systems (their transference within a social system itself), do not resonate as peculiar. They are features of a post-modern administrative, legal and political normality that is thought of as ‘essentially humanizing’, or essentially responsible. Irresponsibility or immorality, are thus not conceived of as internal, constitutive or structural. According to Bauman, “the incidence of immoral conduct on anything more than a marginal scale may be explained as an effect of the malfunctioning of ‘normal’ social arrangements.”⁸⁸² Chapter 3 argued that the irresponsibility of R2P is constitutive of the normal functioning of our organizing practices, or as Veitch has put it, “of the system working.”⁸⁸³ In this sense, irresponsibility should primarily be seen as the other of responsibility (in Derrida’s language) and not as a state of exception. To this end, the predilection of international lawyers for legal individual accountability, state sovereignty and formalism significantly limit our capacity to both theorize responsibility in international law and approach in fruitful ways the issue of ‘large scale loss of life’. In many ways, both the formalistic approach to law and the managerialist approaches to mass atrocities can reduce our ability to look for the conditions that fabricate and become entangled with the domain of global ethical responsibility.

Response-ability and critique

All these conclusions point to a limited theorizing of responsibility in international law. Instead, what should be vigorously pursued in further research, is what Anne Orford rightly described as “[the] variety of ways to come to terms with the complicated and infinite process of constituting the subject through the

⁸⁸² Bauman, *op cit*, p. 198.

⁸⁸³ Veitch, *op cit*.

institutions of law and language.”⁸⁸⁴ The concept of global ethical responsibility reveals an on-going relationship between security apparatuses and discourse, individual and collective subject-formation and legal norms and universals. Social international structures penetrate conceptions of self and community as well as the boundaries of a global ethical relationality. Security practices and global ethical norms, such as R2P, constitute and are constitutive of both state and non-state identities and behaviour. Legal cosmopolitan and liberal internationalist approaches to mass human rights atrocities, showcase a denial to address the full scene of recognition underpinned by inter-subjective/intra-subjective constitution and moments of exclusion or misrecognition both in the theory and practice of global ethical responsibility. Such a global ethical responsibility becomes aggressive, turns back against itself, as it does not recognize the Other as part of the constitution of the collective self.

This thesis argued that ‘response-ability’ is an on-going relation bound up with the operation of critique. Ethical decision-making and response-ability is a process and a relation of negotiation at the time of encounter. The encounter and the moment of decision is to be seen as a process of interaction which sustains the space of community, of identity and of global ethical responsibility infinitely. Reinventing an ethical tradition and retreating to delimited understandings of responsibility and sovereignty offers no robust alternatives and is not enough if ‘we’ are to address or respond in robust ways to the issue of mass human rights atrocities and ‘large scale loss of life’. And perhaps responsibility is irresponsibility, recognizing all that we fail to account for, or that we misrecognize, realising responsibility as history of responsibility, the acknowledgement of the uncertainty and boundlessness of who the ‘we’ or the ‘they’ is; perhaps responsibility is the many calls to explain oneself that we do not answer or refuse to answer ‘for oneself before the other.’ This requires ‘intellectual restlessness’, being willing to communicate the limits of self-understanding and the limits of agency; in other words, performing vulnerability, not keeping in secret, exposing oneself and living *with* discomfort.

⁸⁸⁴ Orford, 2006, *op cit.*, p. 4.

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